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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA
SOUTHERN DIVISION**

IN RE: § Case No. 09-14814-LBR
THE RHODES COMPANIES, LLC, § (JointlyAdministered)
aka "Rhodes Homes," *et al.*, §
Debtors.¹ § Chapter 11
§
§
§
§ Hearing Date: January 1
§ Hearing Time: 9:00 a.m.

¹ The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, if applicable, are: Heritage Land Company, LLC (2918); The Rhodes Companies, LLC (3060); Rhodes Ranch General Partnership (1760); Tick, LP (0707); Glynda, LP (5569); Chalkline, LP (0281); Batcave, LP (6837); Jackknife, LP (6189); Wallboard, LP (1467); Overflow, LP (9349); Rhodes Ranch Golf and Country Club (9730); Tuscany Acquisitions, LLC (0206); Tuscany Acquisitions II, LLC (8693); Tuscany Acquisitions III, LLC (9777); Tuscany Acquisitions IV, LLC (0509); Parcel 20 LLC (5534); Rhodes Design and Development Corp. (1963); C&J Holdings, Inc. (1315); Rhodes Realty, Inc. (0716); Jarupa LLC (4090); Elkhorn Investments, Inc. (6673); Rhodes Homes Arizona, LLC (7248); Rhodes Arizona Properties, LLC (8738); Tribes Holdings LLC (4347); Six Feathers Holdings, LLC (8451); Elkhorn Partners, A Nevada Limited Partnership (9654); Bravo Inc. (2642); Gung-Ho Concrete, LLC (6966); Geronimo Plumbing, LLC (6897); Apache Framing, LLC (6352); Tuscany Golf Country Club, LLC (7132); Pinnacle Grading, LLC (4838).

1	Affects:	§	FIRST LIEN STEERING COMMITTEE'S
2	<input checked="" type="checkbox"/> All Debtors	§	MEMORANDUM OF LAW IN SUPPORT OF
3	<input type="checkbox"/> Affects the following	§	CONFIRMATION OF THE SECOND
4	Debtor(s)	§	AMENDED MODIFIED PLAN OF
5		§	REORGANIZATION PURSUANT TO
6		§	CHAPTER 11 OF THE BANKRUPTCY
		§	CODE FOR THE RHODES COMPANIES,
		§	LLC, ET AL.

The First Lien Steering Committee (the “First Lien Steering Committee”), consisting of certain unaffiliated lenders under the Credit Agreement dated as of November 21, 2005 among Heritage Land Company, LLC, The Rhodes Companies, LLC, and Rhodes Ranch General Partnership, as the Borrowers, the Lenders Listed Therein as the Lenders (collectively, the “First Lien Lenders”), and Credit Suisse, Cayman Islands Branch, as Administrative Agent, Collateral Agent, Syndication Agent, Sole Bookrunner and Sole Lead Arranger, by and through its undersigned counsel, hereby files this Memorandum of Law (the “Memorandum”) in Support of the Second Amended Modified Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code for the Rhodes Companies, LLC, *et al.* (the “Plan”). In support of this Memorandum, the First Lien Steering Committee respectfully represents as follows:

PRELIMINARY STATEMENT²

1. Over the course of the Debtors’ Chapter 11 Cases, the First Lien Steering Committee has worked constructively with the Debtors, the Rhodes Entities, the Creditors’ Committee, the Second Lien Agent, the First Lien Agent and all other parties in interest

² Terms not otherwise defined herein shall have the meanings ascribed to such terms in the Plan or the Second Amended Modified Disclosure Statement for the Plan (the “Disclosure Statement”), as applicable.

1 towards the goal of achieving a confirmable, consensual plan of reorganization. The Plan
 2 represents the realization of that goal.

3 2. Through extensive negotiations culminating in the Mediation Settlement (as
 4 defined below), the First Lien Steering Committee has proposed a Plan that (i) provides a
 5 meaningful recovery to both the Debtors' secured and unsecured creditors and (ii) is
 6 supported by virtually all of the major parties-in-interest in the Debtors' Chapter 11 Cases.
 7 In light of the considerable support enjoyed by the Plan among the Debtors' creditors, the
 8 First Lien Steering Committee believes that the Plan provides the best mechanism for
 9 maximizing the value of the Debtors' Estates for the benefit of all creditors and facilitating
 10 the Debtors' emergence from bankruptcy.

11 3. Moreover, the First Lien Steering Committee submits that this Memorandum,
 12 together with the additional evidence to be adduced at the Confirmation Hearing (as defined
 13 below), demonstrates that the Plan satisfies all of the requirements for confirmation under
 14 the Bankruptcy Code and should therefore be confirmed.

BACKGROUND

A. The Debtors and the Chapter 11 Cases

15 4. The Debtors are primarily engaged in the business of building and selling
 16 detached homes in Nevada. In total, the Debtors have developed 40 communities since their
 17 founding in 1988, generating over \$2.4 billion in total revenues. The Debtors have built
 18 more than 6,000 homes in the Las Vegas valley during the past two decades.

19 5. In connection with the nationwide downturn in the housing market in 2008,
 20 the Las Vegas housing market and the Debtors' businesses began to decline. At the end of
 21 the fourth quarter of 2008, sales in the Las Vegas housing market of new, detached homes
 22

were down 93% (to 522 net sales) from the peak (7,731 quarterly net sales) that occurred in the second quarter of 2005. The median base price for a detached single family home dropped 39% from the peak achieved in the fourth quarter of 2005.

6. Although the Debtors made cost reductions in general overhead and other areas, including employee layoffs, many factors, including the severe downturn of the Las Vegas market, significant supply overhang, and general economic malaise combined to create an environment where the Debtors were unable to meet their March 2009 debt and amortization payments. The First Lien Steering Committee was formed in early March 2009 to negotiate the terms of a forbearance agreement and consensual restructuring with the Debtors after it became apparent that the Debtors would not be able to make their regularly scheduled interest and amortization payments under the First Lien Credit Agreement.

7. On March 31, 2009, an interest payment in the amount of approximately \$9 million and a principal payment in the amount of \$10.75 million was due and owing on the First Lien Credit Agreement and an interest payment in the amount of approximately \$2.4 million was due and owing on the Second Lien Credit Agreement. Despite extended and intensive negotiations between the First Lien Lenders and the Debtors, the parties were unable to reach agreement, and the Debtors commenced the Chapter 11 Cases on March 31, 2009 and April 1, 2009 (collectively, the "Petition Date").

8. Pursuant to Bankruptcy Code sections 1107(a) and 1108, the Debtors are currently authorized to operate their businesses and manage their properties as debtors in possession. The Debtors' Chapter 11 Cases are being jointly administered for procedural purposes only. No trustee or examiner has been appointed in the Debtors' Chapter 11 Cases.

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1 9. On May 26, 2009, pursuant to Bankruptcy Code section 1102, the United
2 States Trustee for the District of Nevada appointed an Official Committee of Unsecured
3 Creditors (the “Creditors’ Committee”). The Creditors’ Committee currently consists of four
4 members: G.C. Wallace, Inc.; Interstate Plumbing & Air Conditioning; M & M Electric, Inc.;
5 and Southwest Iron Works, LLC.
6

7 **B. The Mediation Settlement and the Plan**

8 10. On August 17, 24 and 25, 2009, the First Lien Steering Committee, the
9 Second Lien Agent, the Creditors’ Committee, the Debtors and the Rhodes Entities
10 (collectively, the “Mediation Parties”) participated in a mediation over the terms of a
11 proposed plan of reorganization for the Debtors before the Honorable Richard Neiter of the
12 United States Bankruptcy Court for the Central District of California. During the mediation,
13 the Mediation Parties reached an agreement in principle on a comprehensive settlement (the
14 “Mediation Settlement”). The Plan embodies the terms of the Mediation Settlement.
15

16 11. In general, the Mediation Settlement and the Plan provide, among other
17 things, that the First Lien Lenders will assume ownership of the Debtors and will continue to
18 operate the Debtors as a going concern homebuilder primarily in the Las Vegas, Nevada
19 market. In addition, the First Lien Lenders will receive, on account of their Secured Claims,
20 \$1.5 million in Cash from their collateral and their pro rata share of \$50 million in new
21 secured notes. The First Lien Lenders will use the \$1.5 million Cash portion of their
22 recovery to purchase the Claims of many of the Debtors’ creditors that hold General
23 Unsecured Claims for the allowed amount of such Claim. The Second Lien Lenders will
24 receive 50% of the net proceeds of certain pending litigation on account of their Secured
25 Claims. The Rhodes Entities will, among other things, pay \$3.5 million in Cash to the
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1 Reorganized Debtors and will receive, among other things, (i) a limited release as described
2 in the Plan and (ii) certain assets located in Arizona. The Plan also provides for the
3 establishment of a Litigation Trust that will pursue certain Claims and Causes of Action
4 belonging to the Debtors' Estates for the benefit of those creditors holding General
5 Unsecured Claims whose Claims are not purchased by the First Lien Lenders. The First
6 Lien Lenders and the Second Lien Lenders will also receive distributions from the Litigation
7 Trust as unsecured creditors on account of their First Lien Lender Deficiency Claims and
8 Second Lien Lender Deficiency Claims.

10 **C. Plan Solicitation Process and Voting Status**

12 12. On December 1, 2009, the Court entered the Order (A) Approving the
13 Adequacy of the First Lien Steering Committee's Disclosure Statement; (B) Approving
14 Solicitation and Notice Procedures with Respect to Confirmation of the First Lien Steering
15 Committee's Proposed Plan of Reorganization; (C) Approving the Form of Various Ballots
16 and Notices in Connection Therewith; and (D) Scheduling Certain Dates with Respect
17 Thereto (Docket No. 809) (the "Solicitation Procedures Order"). The Solicitation
18 Procedures Order (i) approved the Disclosure Statement for the Plan as containing adequate
19 information within the meaning of Bankruptcy Code section 1125(a), (ii) fixed December 1,
20 2009, as the record date for purposes of determining eligibility to vote to accept or reject the
21 Plan, (iii) fixed January 4, 2010 at 4:00 p.m. (Pacific Time) as the deadline for submitting
22 ballots accepting or reject the Plan, (iv) fixed January 4, 2010 at 4:00 p.m. (Pacific Time) as
23 the deadline for filing objections to the Plan, (v) fixed January 11, 2010, as the deadline for
24 filing the Memorandum, (vi) fixed January 11, 2010 as the deadline by which Omni
25 Management Group, LLC (the "Claims and Solicitation Agent") must file its report
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1 summarizing the results of voting on the Plan (the “Voting Report”), and (vii) fixed January
2 14, 2010 at 9:00 a.m. (Pacific Time) as the date and time for the hearing of the confirmation
3 hearing (the “Confirmation Hearing”) on the Plan. The Solicitation Procedures Order also
4 approved certain procedures for soliciting votes to accept or reject the Plan (the “Solicitation
5 Procedures”).

6
7 13. In accordance with the Solicitation Procedures Order, the solicitation
8 materials described in the Solicitation Procedures were transmitted to and served on all
9 Holders of Claims that were entitled to vote to accept or reject the Plan, as well as certain
10 other parties in interest in the Debtors’ Chapter 11 Cases.

11
12 14. On January 11, 2010, the Claims and Solicitation Agent filed its Voting
13 Report setting forth the Plan voting results. Pursuant to the Plan, each of the following
14 Classes were entitled to vote on the Plan: (i) Class A-1 (First Lien Lender Secured Claims);
15 Class A-2 (Second Lien Lender Secured Claims); Class C-1 (General Unsecured Claims);
16 Class C-2 (First Lien Lender Deficiency Claims); and Class C-3 (Second Lien Lender
17 Deficiency Claims). Classes A-1, A-2, C-2 and C-3 voted to accept the Plan. Class C-1
18 voted to reject the Plan. Holders of claims in Class A-3 (Other Secured Claims) and Class B
19 (Priority Non-Tax Claims) are conclusively presumed to have accepted the Plan and were
20 not entitled to vote on the Plan. Holders of claims in Class C-4 (Subordinated Claims),
21 Class D (Old Equity Interests) and Class E (Intercompany Claims) are deemed to have
22 rejected the Plan and were not entitled to vote on the Plan.
23
24

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ARGUMENT

A. The First Lien Steering Committee Satisfies the Burden of Proof under Bankruptcy Code Section 1129

15. To confirm the Plan, the First Lien Steering Committee must demonstrate that the Plan satisfies the applicable provisions of Bankruptcy Code section 1129 by a preponderance of the evidence. As set forth by the United States Court of Appeals for the Ninth Circuit (the “Ninth Circuit”) in *Liberty Nat'l Enters. v. Ambanc La Mesa Ltd. P'ship* (*In re Ambanc La Mesa Ltd. P'ship.*), “[t]he bankruptcy court must confirm a Chapter 11 [plan proponent's] plan of reorganization if the [plan proponent] proves by a preponderance of the evidence” that the plan satisfies Bankruptcy Code section 1129. 115 F.3d 650, 653 (9th Cir. 1997); see also *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II* (*In re Briscoe Enters., Ltd., II*), 994 F.2d 1160, 1164-65 (5th Cir. 1993) (concluding that preponderance of the evidence is the appropriate standard for both consensual and nonconsensual plan confirmation); 7 *Collier on Bankruptcy* ¶ 1129.02[4], at 1129-22 (15th ed. rev. 2009) (“[T]he proponent bears the burdens of both introduction of evidence and persuasion that each subsection of section 1129(a) has been satisfied.”).

16. Based upon (i) the Disclosure Statement and all exhibits thereto, including the Going Concern Analysis and the Liquidation Analysis, (ii) the Declaration of Brian Osborne Certifying Tabulation of Ballots Regarding Vote on Second Amended Modified Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code for The Rhodes Companies, LLC, *et al.*, dated January 11, 2010 (the “Osborne Declaration”), (iii) the Voting Report attached to the Osborne Declaration as Exhibit A, (iv) the Declaration of Richard Dix in Support of Confirmation of the Second Amended Modified Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code for The Rhodes Companies,

1 LLC, *et al.* (the “Dix Declaration”), and (v) any other declarations, testimony and evidence
 2 introduced at the Confirmation Hearing, the First Lien Steering Committee has proven by a
 3 preponderance of the evidence that all subsections of Bankruptcy Code section 1129 have
 4 been satisfied in respect of the Plan.
 5

6 **B. The Plan Complies with Bankruptcy Code Section 1122: Classification of
 7 Claims and Interests**

8 17. Bankruptcy Code section 1122 governs the classification of claims or
 9 interests under a plan and provides, in pertinent part, as follows:

10 [A] plan may place a claim or interest in a particular class only if such claim
 11 or interest is substantially similar to the other claims or interests of such
 12 class.

13 11 U.S.C. § 1122(a). Under this section, the relevant inquiries are (i) whether all claims and
 14 interests in a class have substantially similar rights with respect to the debtor’s assets, and
 15 (ii) whether there are sufficient business or legal justifications to justify separate classes of
 16 similar claims or interests. *See Oxford Life Ins. Co. v. Tucson Self-Storage, Inc. (In re*
 17 *Tucson Self-Storage, Inc.*), 166 B.R. 892, 897 (B.A.P. 9th Cir. 1994) (“Separate
 18 classifications for unsecured creditors are only justified ‘where the legal character of their
 19 claims is such as to accord them a status different from the other unsecured creditors’”)
 20 (citation and internal quotation marks omitted); *Principal Mut. Life Ins. Co. v. Baldwin Park*
 21 *Towne Ctr., Ltd (In re Baldwin Park Towne Ctr., Ltd.)*, 171 B.R. 374, 376 (Bankr. C.D. Cal.
 22 1994) (holding that substantially similar claims may be separately classified if there is some
 23 business or economic justification for doing so).

24 18. Article III.A of the Plan provides for the classification of Claims and Interests
 25 in ten individual Classes, each based upon the legal nature and/or priority of such Claims
 26 and Interests. Administrative Claims and Priority Tax Claims are not classified and are
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1 separately treated in Article II of the Plan. The Classes of Claims and Interests are as
 2 follows:

Class	Claim or Interest Type
A-1	First Lien Lender Secured Claims
A-2	Second Lien Lender Secured Claims
A-3	Other Secured Claims
B	Priority Non-Tax Claims
C-1	General Unsecured Claims
C-2	First Lien Lender Deficiency Claims
C-3	Second Lien Lender Deficiency Claims
C-4	Subordinated Claims
D	Old Equity Interests
E	Intercompany Claims

19. Each of the Claims or Interests in each particular Class is substantially
 similar to the other Claims or Interests in such Class. Accordingly, the First Lien Steering
 Committee's classification of Claims and Interests does not prejudice the rights of Holders
 of such Claims and Interests. *Steelcase, Inc v. Johnston (In re Johnston)*, 21 F.3d 323, 327-
 28 (9th Cir. 1994) (holding that separate classification was permissible and that bankruptcy
 courts have broad discretion to classify claims); *Tucson Self-Storage, Inc.*, 166 B.R. at 897
 (plan proponent allowed considerable discretion to classify claims and interests according to
 facts and circumstances of case so long as classification scheme does not violate basic
 priority rights or manipulate voting); *State St. Bank & Trust Co. v. Elmwood, Inc. (In re
 Elmwood, Inc.)*, 182 B.R. 845, 849 (D. Nev. 1995) ("A plan may place substantially similar
 claims in different classes when a reasonable nondiscriminatory basis exists for such
 treatment."). The classification of Claims and Interests in the Plan complies with
 Bankruptcy Code section 1122(a).

1 **C. The Plan Complies with Bankruptcy Code Section 1123: Contents of the Plan**

2 ***I. 11 U.S.C. § 1123(a)***

3 20. Bankruptcy Code section 1123(a) sets forth eight requirements with which
4 every chapter 11 plan must comply. *See* 11 U.S.C. § 1123(a). As demonstrated below, the
5 Plan fully complies with those requirements.

6 ***a. The Plan Designates Classes of Claims and Interests – 11 U.S.C.
§ 1123(a)(1)***

7 21. Bankruptcy Code section 1123(a)(1) requires that a plan designate classes of
8 claims, other than claims of a kind specified in Bankruptcy Code sections 507(a)(2)
9 (administrative expense claims), 507(a)(3) (claims arising during the “gap” period in an
10 involuntary case), or 507(a)(8) (priority tax claims). *See* 11 U.S.C. § 1123(a)(1). As set
11 forth above, Article III.A of the Plan designates 9 Classes of Claims and one Class of
12 Interests and therefore complies with Bankruptcy Code section 1123(a)(1).

13 ***b. The Plan Specifies Unimpaired Classes – 11 U.S.C. § 1123(a)(2)***

14 22. Bankruptcy Code section 1123(a)(2) requires that a plan “specify any class of
15 claims or interests that is not impaired under the plan.” *See* 11 U.S.C. § 1123(a)(2). Article
16 III.B of the Plan specifies the Classes of Claims and Interests that are Unimpaired under the
17 Plan, and thus the Plan complies with Bankruptcy Code section 1123(a)(2).

18 ***c. The Plan Adequately Specifies the Treatment of Impaired Classes – 11
U.S.C. § 1123(a)(3)***

19 23. Bankruptcy Code section 1123(a)(3) requires that a plan “specify the
20 treatment of any class of claims or interests that is impaired under the plan.” *See* 11 U.S.C.
21 § 1123(a)(3). Article III.B of the Plan specifies the treatment of those Claims and Interests
22 that are Impaired under the Plan, and thus the Plan complies with Bankruptcy Code section
23 1123(a)(3).

1 ***d. The Plan Provides for the Same Treatment for Claims or Interests Within
2 the Same Class – 11 U.S.C. § 1123(a)(4)***

3 24. Bankruptcy Code section 1123(a)(4) requires that a plan “provide the same
4 treatment for each claim or interest of a particular class, unless the holder of a particular
5 claim or interest agrees to a less favorable treatment of such particular claim or interest.” 11
6 U.S.C. § 1123(a)(4). This provision provides creditors of the same class with a right to
7 equality of treatment. Article III.B of the Plan provides for equality of treatment for each
8 Claim or Interest within a particular Class. Thus, the Plan complies with Bankruptcy Code
9 section 1123(a)(4).

10 ***e. The Plan Provides Adequate Means for Its Implementation – 11 U.S.C.
11 § 1123(a)(5)***

12 25. Bankruptcy Code section 1123(a)(5) requires a plan of reorganization to
13 “provide adequate means for the plan’s implementation” and sets forth several examples of
14 such means, including retention by the debtor of property of the estate, sales of the debtor’s
15 property, satisfaction or modification of any lien, and issuance of securities of the debtor in
16 exchange for claims or interests. 11 U.S.C. § 1123(a)(5). Article IV of the Plan provides
17 for, among other things: (i) the substantive consolidation of the Estates into a single Estate
18 for all purposes associated with confirmation and distributions to be made under the Plan
19 (*See* Plan Art. IV.A); (ii) the issuance of Newco Equity Interests (based upon the Newco
20 Total Enterprise Value) to the Holders of First Lien Lender Secured Claims (*See* Plan Art.
21 IV.B.1); (iii) the issuance of \$50 million in New First Lien Notes to the Holders of First
22 Lien Lender Secured Claims (*See* Plan Art. IV.B.2); (iv) the cancellation of Old Equity
23 Interests and certain other existing securities (*See* Plan Art. IV.E); (v) any restructuring
24 transaction deemed necessary or appropriate to effectuate the Plan (*See* Plan Art. IV.G);
25 (vi) the selection of the initial board of directors and officers of the Reorganized Debtors
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(See Plan Art. IV.M); (vii) the establishment of a Litigation Trust for the benefit of Holders of Allowed Claims in Classes C-1, C-2 and C-3 (See Plan Art. IV.O); (viii) the transfer of the Rhodes Ranch Golf Course to the Reorganized Debtors pursuant to the terms of a stock transfer agreement (See Plan Art. IV.S); (ix) the payment of \$3.5 million in Cash to the Reorganized Debtors by the Rhodes Entities on the Effective Date (See Plan Art. IV.T); and (x) the transfer of the Arizona Assets set forth on Attachment D to the Mediation Term Sheet to the Rhodes Entities (See Plan Art. IV.U). In addition, the Plan provides that the Holders of First Lien Lender Secured Claims will receive \$1.5 million in Cash from the proceeds of the First Lien Lenders' collateral for the purpose of purchasing the General Unsecured Claims set forth on Exhibit H to the Disclosure Statement. See Plan Art. VII.F-G. Thus, the Plan complies with Bankruptcy Code section 1123(a)(5).

f. Prohibition on the Issuance of Nonvoting Equity Securities – 11 U.S.C. § 1123(a)(6)

26. Bankruptcy Code section 1123(a)(6) requires a plan of reorganization to provide for the inclusion in a debtor's corporate charter of provisions prohibiting the issuance of non-voting equity securities and arranging "an appropriate distribution" of power among the classes of securities possessing voting power. See 11 U.S.C. § 1123(a)(6). Article IV.J of the Plan expressly provides that:

The organizational documents for Newco shall, among other things:
 (1) authorize issuance of the Newco Equity Interests; and (2) pursuant to and only to the extent required by section 1123(a)(6) of the Bankruptcy Code, include a provision prohibiting the issuance of non-voting Equity Securities.

See Plan Art. IV.J. The Plan therefore complies with Bankruptcy Code section 1123(a)(6).

1 g. ***The Plan Contains Appropriate Provisions with Respect to the Selection of***
 2 ***Post-Confirmation Directors and Officers – 11 U.S.C. § 1123(a)(7)***

3 27. Bankruptcy Code section 1123(a)(7) provides that a plan may “contain only
 4 provisions that are consistent with the interests of creditors and equity security holders and
 5 with public policy with respect to the manner of selection of any officer, director, or trustee
 6 under the plan and any successor to such officer, director, or trustee.” 11 U.S.C.
 7 § 1123(a)(7).

8 28. Article IV.M of the Plan provides that the board of directors of the
 9 Reorganized Debtors or similar governing entities will be composed of one or more
 10 members appointed by the First Lien Steering Committee. *See* Plan Art. IV.M. In addition,
 11 the Plan provides that, on the Effective Date, a chief executive officer or similar officer
 12 selected by the board of directors of the Reorganized Debtors shall be appointed. *See* Plan
 13 Art. IV.M. Finally, the Plan provides that the identity of such officers and directors shall be
 14 disclosed at or prior to the Confirmation Hearing. *See* Plan Art. IV.M. The provisions of
 15 the Plan for the selection of directors and officers are consistent with the interests of
 16 creditors and Interest Holders and with public policy as to the manner and selection of any
 17 officer, director, or trustee and any successor thereto. Moreover, as described further below,
 18 such Plan provisions satisfy the requirements of Bankruptcy Code section 1129(a)(5) in that
 19 the First Lien Steering Committee will disclose, on or prior to the Confirmation Date, the
 20 identity and affiliations of any Person proposed to serve on the initial boards of directors of
 21 the Reorganized Debtors and, to the extent such Person is an insider, the nature of any
 22 compensation to be paid to such Person. *See* Notice of Disclosure of Directors and Officers
 23 Pursuant to 11 U.S.C. § 1129(a)(5) for Second Amended Plan of Reorganization Pursuant to
 24 Chapter 11 of the Bankruptcy Code for The Rhodes Companies, LLC *et al.* (Docket No.
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1 911). The classification and composition of the boards of directors of each of the
 2 Reorganized Debtors will be consistent with each Reorganized Debtor's amended or restated
 3 certificate of incorporation, as applicable, the other applicable constituent documents of each
 4 Reorganized Debtor, and applicable law. The Plan therefore complies with Bankruptcy
 5 Code section 1123(a)(7).

7 ***h. Bankruptcy Code Section 1123(a)(8) is Not Implicated by the Plan – 11***
 8 ***U.S.C. § 1123(a)(8)***

9 29. Bankruptcy Code section 1123(a)(8) states that a plan that is filed in a case in
 10 which the debtor is an individual must “provide for the payment to creditors under the plan
 11 of all or such portion of earnings from personal services performed by the debtor after the
 12 commencement of the case or other future income of the debtor as is necessary for the
 13 execution of the plan.” *See* 11 U.S.C. § 1123(a)(8). Each of the Debtors are business
 14 entities, and not individuals. Accordingly, Bankruptcy Code section 1123(a)(8) is not
 15 implicated by the Plan.

17 ***2. 11 U.S.C. § 1123(b)***

18 30. Bankruptcy Code section 1123(b) sets forth the permissive provisions that
 19 may be incorporated into a chapter 11 plan, including any “provision not inconsistent with
 20 the applicable provisions of [the Bankruptcy Code].” *See* 11 U.S.C. § 1123(b)(6).

22 ***a. The Plan Impairs Certain Classes and Leaves Others Unimpaired – 11***
 23 ***U.S.C. 1123(b)(1)***

24 31. Bankruptcy Code section 1123(b)(1) provides that a plan may “impair or
 25 leave unimpaired any class of claims, secured or unsecured, or of interests.” 11 U.S.C.
 26 § 1123(b)(1). Pursuant to Article III.B of the Plan, Classes A-3 and B are Unimpaired, and
 27 Classes A-1, A-2, C-1, C-2, C-3, C-4, D and E are Impaired. The Plan complies with
 28 Bankruptcy Code section 1123(b)(1).

1 ***b. Treatment of Executory Contracts and Unexpired Leases – 11 U.S.C.***
 2 ***§ 1123(b)(2)***

3 32. Bankruptcy Code section 1123(b)(2) allows a plan to provide for the
 4 assumption, assumption and assignment, or rejection of executory contracts and unexpired
 5 leases pursuant to Bankruptcy Code section 365. Article V.A of the Plan provides that the
 6 Debtors' executory contracts and unexpired leases that have not been assumed or rejected
 7 pursuant to an order of the Court prior to the Effective Date shall be deemed rejected, except
 8 for those executory contracts and unexpired leases that (i) are listed on the schedule of
 9 Assumed Executory Contracts and Unexpired Leases attached to the Disclosure Statement
 10 as Exhibit N, (ii) are Intercompany Contracts, in which case such Intercompany Contracts
 11 are deemed automatically assumed by the applicable Debtor as of the Effective Date, unless
 12 such Intercompany Contract was previously rejected or is the subject of a motion to reject
 13 pending as of the Effective Date, (iii) are the subject of a motion to assume or reject pending
 14 on the Effective Date (in which case such assumption or rejection and the effective date
 15 thereof shall remain subject to an order of the Court), (iv) are subject to a motion to reject
 16 with a requested effective date of rejection after the Effective Date, or (v) are otherwise
 17 expressly assumed or rejected pursuant to the Plan.
 18

21 ***c. Settlement or Retention of Claims or Interests – 11 U.S.C. § 1123(b)(3)***

22 33. Bankruptcy Code section 1123(b)(3) provides that a plan may provide for the
 23 settlement or retention of any claim or interest belonging to the debtor. Article IV.P of the
 24 Plan provides that the Reorganized Debtors and/or the Litigation Trust, as applicable, shall
 25 retain and may enforce any and all Causes of Action, whether arising before or after the
 26 Petition Date, including those actions specifically enumerated on Exhibit L to the Disclosure
 27 Statement. See Plan Art. IV.P. Moreover, the Plan provides that the Reorganized Debtors
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1 and/or the Litigation Trust, as applicable, may pursue such Causes of Action in accordance
2 with the best interests of the Reorganized Debtors and the Litigation Trust, as applicable.

3 See Plan Art. IV.P. The Causes of Action to be transferred to the Litigation Trust are
4 specifically set forth in Exhibit G to the Disclosure Statement. See Disclosure Statement Ex.
5 G.

6 34. Notwithstanding the foregoing, the Plan provides for (i) the release of the
7 Rhodes Entities from certain avoidance actions arising under chapter 5 of the Bankruptcy
8 Code, (ii) the release of the Released Parties (as defined below) from certain Claims and
9 Causes of Action belonging to the Debtors, and (iii) the voluntary release of First Lien
10 Lenders from certain Claims and Causes of Action that could be asserted by other First Lien
11 Lenders as part of the Mediation Settlement embodied in the Plan. As more fully discussed
12 below, the First Lien Steering Committee believes that the Mediation Settlement is fair and
13 reasonable and that the releases granted in connection with the Mediation Settlement and the
14 Plan are appropriate. The First Lien Steering Committee therefore submits that Bankruptcy
15 Code section 1129(b)(3) is satisfied.

16 ***d. Other Appropriate Measures – 11 U.S.C. § 1123(b)(6)***

17 35. Bankruptcy Code section 1123(b)(6) is a catch-all provision that permits
18 inclusion of any appropriate provision so long as it is consistent with the applicable
19 provisions of the Bankruptcy Code. Article XII of the Plan provides that, among other
20 things, the Court shall retain jurisdiction over all matters arising out of and related to the
21 Chapter 11 Cases and the Plan. This provision is appropriate because the Court otherwise
22 has jurisdiction over all of these matters during the pendency of the Chapter 11 Cases, and
23 case law establishes that a bankruptcy court may retain jurisdiction over the debtor or the
24

1 property of the estate following confirmation. *See Carraher v. Morgan Elecs., Inc. (In re*
 2 *Carraher)*, 971 F.2d 327, 328 (9th Cir.1992) (holding that bankruptcy courts may retain
 3 jurisdiction over related cases when the underlying bankruptcy case is dismissed).

4 Accordingly, the continuing jurisdiction of the Court is consistent with applicable law and is
 5 therefore permissible under Bankruptcy Code section 1123(b)(6).

6 36. Based upon the foregoing, the Plan fully complies with the requirements of
 7 Bankruptcy Code sections 1122 and 1123, as well as with all other provisions of the
 8 Bankruptcy Code, and thus satisfies the requirement of Bankruptcy Code section 1129(a)(1).

9 **D. The Plan Satisfies the Requirements of Bankruptcy Code Section 1129(a)**

10 **I. The Plan Satisfies the Requirements of Bankruptcy Code Section**
 11 **1129(a)(1)**

12 37. Bankruptcy Code section 1129(a)(1) requires that “[t]he plan compl[y] with
 13 the applicable provisions of this title.” 11 U.S.C. § 1129(a)(1). Section 1129(a)(1) has been
 14 interpreted by the courts as requiring that a plan comply with section 1122 (governing
 15 classification of claims) and 1123 (governing the contents of a plan). *Official Comm. of*
 16 *Unsecured Creditors of W. Farm Credit Bank v. Michelson (In re Michelson)*, 141 B.R. 715,
 17 721 (Bankr. E.D. Cal. 1992); *see also In re Drexel Burnham Lambert Group, Inc.*, 138 B.R.
 18 723, 757 (Bankr. S.D.N.Y. 1992) (“Drexel I”) (noting that “[t]he legislative history of
 19 § 1129(a)(1) explains that this provision embodies the requirements of §§ 1122 and 1123,
 20 respectively, governing classification of claims and the contents of the Plan”); S. Rep. No.
 21 95-989, at 126 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787 (stating that “[p]aragraph (1)
 22 [of 1129(a)] requires that the plan comply with the applicable provisions of chapter 11, such
 23 as §§ 1122 and 1123, governing classification of [a] plan”); H.R. REP. NO. 95-595, at 412
 24 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963 (same). As discussed above, the Plan
 25

1 complies fully with the requirements of both sections 1122 and 1123, as well as other
 2 provisions of the Bankruptcy Code.

3 **2. *The Plan Proponent Has Complied with the Provisions of Title 11 as***
 4 ***Required by Bankruptcy Code Section 1129(a)(2)***

5 38. Bankruptcy Code section 1129(a)(2) requires the proponent of a plan to
 6 comply “with the applicable provisions of this title.” *See* 11 U.S.C. § 1129(a)(2). Whereas
 7 Bankruptcy Code section 1129(a)(1) focuses on the form and content of a plan itself, section
 8 1129(a)(2) is concerned with the applicable activities of a plan proponent under the
 9 Bankruptcy Code. *See* Lawrence P. King, *7 Collier on Bankruptcy* ¶ 1129.03[2], at 1129-26
 10 (15th ed. rev. 2006); *see also* *Andrew v. Coopersmith (In re Downtown Inv. Club III)*, 89
 11 B.R. 59, 65 (B.A.P. 9th Cir. 1988) (“Bankruptcy Code § 1127(b) requires that a modified
 12 plan must comply with Bankruptcy Code § 1129. Section 1129(a)(2) in turn requires that
 13 the proponent of the plan complies with the applicable provisions of Title 11.”). In
 14 determining whether a plan proponent has complied with this section, courts focus on
 15 whether the disclosure and solicitation requirements adhere to Bankruptcy Code sections
 16 1125 and 1126. *See, e.g., Computer Task Group, Inc. v. Brotby (In re Brotby)*, 303 B.R.
 17 177, 192-93 (B.A.P. 9th Cir. 2003) (focusing its analysis under section 1129(b) on the
 18 adequacy of the disclosure and solicitation of the plan); *Drexel I*, 138 B.R. at 759 (noting
 19 that the legislative history of section 1129(a)(2) explains that this provision embodies the
 20 disclosure and solicitation requirements under sections 1125 and 1126); *In re Johns-*
 21 *Manville Corp.*, 68 B.R. 618, 630 (Bankr. S.D.N.Y. 1986), *aff’d in part, rev’d in part, on*
 22 *other grounds*, 78 B.R. 407 (S.D.N.Y. 1987), *aff’d*, 843 F.2d 636 (2d Cir. 1988) (stating that
 23 “[o]bjections to confirmation raised under § 1129(a)(2) generally involve the alleged failure

24 of the plan proponent to comply with § 1125 and § 1126 of the Code”); *see also* S. REP. NO.
 25

1 95-989, 95th Cong., 2d Sess. 126 (1978) (stating that section 1129(a)(2) “requires that the
 2 proponent of the plan comply with the applicable provisions of chapter 11, such as section
 3 1125 regarding disclosure”); H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 412 (1977). The
 4 First Lien Steering Committee has complied with the applicable provisions of title 11,
 5 including the provisions of sections 1125 and 1126 regarding the adequacy of disclosure and
 6 plan solicitation.

8 39. Pursuant to the Solicitation Procedures Order entered on December 1, 2009,
 9 after notice and a hearing, this Court approved the Disclosure Statement pursuant to
 10 Bankruptcy Code section 1125(b) as containing “adequate information” of a kind and in
 11 sufficient detail to enable hypothetical reasonable investors typical of the Holders of Claims
 12 entitled to vote on the Plan to make an informed judgment as to whether to accept or reject
 13 the Plan. As evidenced by the Certificate of Service of Nova George, filed December 9,
 14 2009, each Holder of a Claim or Interest received the materials required by the Solicitation
 15 Procedures Order, including, for Holders of Claims entitled to vote, the Disclosure
 16 Statement (which includes, as an exhibit, a copy of the Plan), and a Ballot. The Solicitation
 17 Packages were transmitted in connection with the solicitation of votes to accept or reject the
 18 Plan in compliance with Bankruptcy Code section 1125 and the Solicitation Procedures
 19 Order. *See* 11 U.S.C. §§ 1125(b) and (c). The First Lien Steering Committee did not solicit
 20 votes on the Plan prior to the transmission of the Disclosure Statement.

21 40. Bankruptcy Code section 1126 specifies the requirements for acceptance of
 22 the Plan. Under Bankruptcy Code section 1126, only holders of allowed claims in impaired
 23 classes of claims that will receive or retain property under a plan of reorganization on
 24 account of such claims may vote to accept or reject such plan. As set forth in the Osborne
 25

1 Declaration, in accordance with Bankruptcy Code section 1126, the First Lien Steering
 2 Committee solicited acceptances of the Plan from the Holders of all Claims in each Class of
 3 Impaired Claims that is to receive distributions under the Plan. The Impaired Classes
 4 entitled to vote under the Plan are Classes A-1, A-2, C-1, C-2 and C-3. *See* Plan Art. III.B.
 5 The Plan reflects that Classes A-3 and B are Unimpaired and thus are conclusively
 6 presumed to have accepted the Plan. *See* Plan Art. III.B. The Plan also reflects that Holders
 7 of Claims and Interests in Classes C-4, D and E will receive no property under the Plan and
 8 are conclusively presumed to have rejected the Plan. *See* Plan Art. III.B. In accordance
 9 with Article III.C. of the Plan, the First Lien Steering Committee did not solicit acceptances
 10 from the Holders of Claims and Interests in such Classes. Based upon the foregoing, the
 11 requirements of Bankruptcy Code section 1129(a)(2) have been satisfied.

14 **3. *The Plan Has Been Proposed in Good Faith and Not by Any Means***
 15 ***Forbidden by Law – 11 U.S.C. § 1129(a)(3)***

16 41. Bankruptcy Code section 1129(a)(3) requires that a plan be “proposed in
 17 good faith and not by any means forbidden by law.” 11 U.S.C. § 1129(a)(3). The Ninth
 18 Circuit has held that, although the Bankruptcy Code does not define “good faith,” “[a] plan
 19 is proposed in good faith where it achieves a result consistent with the objectives and
 20 purposes of the Code.” *Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza,*
 21 *L.P.*), 314 F.3d 1070, 1074 (9th Cir. 2002) (citing *Ryan v. Loui (In re Corey),* 892 F.2d
 22 829, 835 (9th Cir.1989)). “[F]or purposes of determining good faith under section
 23 1129(a)(3) . . . the important point of inquiry is the plan itself and whether such plan will
 24 fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code.”
 25 *Id.* (quoting *Stolrow v. Stolrow's, Inc. (In re Stolrow's, Inc.),* 84 B.R. 167, 172 (B.A.P. 9th
 26 Cir. 1988). A plan may also be found to have been proposed in good faith where there is a

1 showing that “the plan was proposed with honesty and good intentions and with a basis for
 2 expecting that a reorganization can be effected.” *Kane v. Johns-Manville Corp. (In re*
 3 *Johns-Manville Corp.*), 843 F.2d 636, 649 (2d Cir. 1988) (citing *Koelbl v. Glessing (In re*
 4 *Koelbl)*, 751 F.2d 137, 139 (2d Cir. 1984) (quoting *Manati Sugar Co. v. Mock*, 75 F.2d 284,
 5 285 (2d Cir. 1935)). Moreover, “[w]here the plan is proposed with the legitimate and honest
 6 purpose to reorganize and has a reasonable hope of success, the good faith requirement of
 7 section 1129(a)(3) is satisfied.” *Brite v. Sun Country Dev., Inc. (In re Sun Country Dev.,*
 8 *Inc.)*, 764 F.2d 406, 408 (5th Cir. 1985). The requirement of good faith must be viewed in
 9 light of the totality of the circumstances surrounding the establishment of a chapter 11 plan.
 10
 11 *Sylmar Plaza, L.P.*, 314 F.3d at 1074. The Plan achieves these goals by enabling the
 12 Debtors to emerge from bankruptcy and continue in the operation of their businesses while
 13 providing creditors with substantial satisfaction of their Claims.

15 42. The Plan is the product of extensive negotiations and embodies the terms of
 16 the Mediation Settlement. The Mediation Settlement was reached among the First Lien
 17 Steering Committee, the Debtors, the Rhodes Entities, the Creditors’ Committee and the
 18 Second Lien Agent following a three day mediation session held on August 17, 24 and 25,
 19 2009 before the Honorable Richard Neiter of the United States Bankruptcy Court for the
 20 Central District of California. As more fully discussed below, the First Lien Steering
 21 Committee believes that the Mediation Settlement is fair and reasonable and should be
 22 approved by the Court. In addition, the First Lien Steering Committee, the Debtors, the
 23 Creditors’ Committee and the Second Lien Agent all support the Plan, and have encouraged
 24 the Holders of Claims in Classes entitled to vote to accept the Plan. The support of these
 25 constituencies reflects the collective acknowledgement by the Debtors’ major creditors that
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1 the Plan provides fundamental fairness and the greatest possible recovery to all creditors.

2 See *In re Eagle-Picher Indus.*, 203 B.R. 256, 274 (Bankr. S.D. Ohio 1996), *aff'd*, 172 F.3d
 3 48 (6th Cir. 1998) (finding that a plan of reorganization was proposed in good faith when,
 4 among other things, it was based on extensive negotiations among the plan proponents and
 5 other parties in interest).

7 **4. The Plan Provides for Court Approval of Payment of Services and**
 8 **Expenses – 11 U.S.C. § 1129(a)(4)**

9 43. Bankruptcy Code section 1129(a)(4) provides that “[a]ny payment made or to
 10 be made by the proponent, by the debtor, or by a person issuing securities or acquiring
 11 property under the plan, for services or for costs and expenses in or in connection with the
 12 case, or in connection with the plan and incident to the case, has been approved by, or is
 13 subject to the approval of, the court as reasonable.” See 11 U.S.C. § 1129(a)(4). This
 14 subsection requires that any and all postpetition fees in the bankruptcy case be disclosed and
 15 subject to the court’s review. See *In re Sagewood Manor Assocs. Ltd. P'ship*, 223 B.R. 756,
 16 774 (Bankr. D. Nev. 1998) (noting that “[a]ll payments made or to be made by [the debtor]
 17 for services or for costs and expenses in or in connection with the case, or in connection
 18 with a plan and incident to the case, have been approved by, or are subject to the approval
 19 of, the court as reasonable as required by 11 U.S.C. § 1129(a)(4).”); *In re Pomare, Ltd.*, No.
 20 08-01448, 2009 WL 3232851, *7 (Bankr. D. Haw. Oct. 2, 2009) (confirming plan with all
 21 post-confirmation fees subject to court approval).

22 44. Pursuant to the interim application procedures established in the Chapter 11
 23 Cases, the Court has authorized and approved the payment of certain fees and expenses of
 24 Professionals retained in the Chapter 11 Cases. Except as otherwise ordered by the Court,
 25 all such fees and expenses, as well as all other accrued fees and expenses of Professionals

1 through the Effective Date, remain subject to final review for reasonableness by the Court
 2 under Bankruptcy Code section 331. In addition, pursuant to Bankruptcy Code sections
 3 503(b)(3) and (4), the Court must review any application for substantial contribution
 4 compensation to ensure compliance with the statutory requirements and that the fees
 5 requested are reasonable.

7 45. The Plan also specifically provides for the review of fees and expenses to be
 8 paid to Professionals. Article IX.A.1 of the Plan provides that all final requests for payment
 9 of the fees and expenses of Professionals retained in the Chapter 11 Cases must be filed no
 10 later than 45 days after the Effective Date, and that the allowed amounts of such fees and
 11 expenses shall be determined by the Court. Additionally, Article IX.A.5 of the Plan
 12 provides that any Entity requesting compensation or reimbursement of expenses for making
 13 a substantial contribution to the Chapter 11 Cases pursuant to Bankruptcy Code sections
 14 503(b)(3), (4) or (5) must file an application for allowance of fees and expenses with the
 15 Court by no later than the Administrative Claim Bar Date.
 16

18 46. The foregoing procedures for the Court's review and ultimate determination
 19 of the fees and expenses to be paid to Professionals participating in the Chapter 11 Cases
 20 satisfy the objectives of section 1129(a)(4). *See In re Sagewood Manor Assocs. Ltd. P'ship*,
 21 223 B.R. at 774; *In re Elsinore Shore Assocs.*, 91 B.R. 238, 268 (Bankr. D.N.J. 1988)
 22 (requirements of section 1129(a)(4) satisfied where plan provided for payment of only
 23 “allowed” administrative expenses); *In re Future Energy Corp.*, 83 B.R. 470, 488 (Bankr.
 24 S.D. Ohio 1988) (“Court approval of payments for services and expenses is governed by
 25 various Code provisions – e.g. §§ 328, 329, 330, 331, and 503(b) – and need not be
 26 explicitly provided for in a Chapter 11 plan.”); 5 *Collier on Bankruptcy* ¶ 1129.02[4], at
 27
 28

1 1129-33, 1129-34 (15th ed. rev. 1993). Based upon the foregoing, the Plan complies with
 2 the requirements of Bankruptcy Code section 1129(a)(4).

3 **5. *All Necessary Information Regarding the Directors and Officers of the***
 4 ***Debtors Under the Plan has been Disclosed – 11 U.S.C. § 1129(a)(5)***

5 47. Bankruptcy Code section 1129(a)(5) requires that (i) the plan disclose the
 6 identity and affiliations of the proposed officers and directors of the reorganized debtors,
 7 (ii) the appointment or continuance of such officers and directors be consistent with the
 8 interests of creditors and equity security holders and with public policy, and (iii) there be
 9 disclosure of the identity and compensation of any insiders to be retained or employed by
 10 the reorganized debtors. *See* 11 U.S.C. § 1129(a)(5).

11 48. The First Lien Steering Committee has satisfied the foregoing requirements.
 12 In accordance with Article IV.M, the First Lien Steering Committee has disclosed the
 13 identity of the officers and directors of the Reorganized Debtors to the Court. On January
 14 11, 2010, the First Lien Steering Committee filed the Notice of Disclosure of Directors and
 15 Officers Pursuant to 11 U.S.C. § 1129(a)(5) for Second Amended Modified Plan of
 16 Reorganization Pursuant to Chapter 11 of the Bankruptcy Code for The Rhodes Companies,
 17 LLC, *et al.* (the “Notice of Disclosure”) disclosing that as of the Effective Date, Dunhill
 18 Homes will provide management services to the Reorganized Debtors and disclosing the
 19 terms of compensation to be paid for such management services. The Notice of Disclosure
 20 also discloses (i) the identity of the members of the initial board of directors of the
 21 Reorganized Debtors, (ii) the identity of the Litigation Trustee, and (iii) the compensation to
 22 be provided to each of the foregoing.

23 49. Based upon the foregoing, the Plan satisfies the requirements of Bankruptcy
 24 Code section 1129(a)(5).

1 ***6. The Plan Does Not Contain Rate Changes Subject to the Jurisdiction of***
 2 ***any Governmental Regulatory Commission – 11 U.S.C. § 1129(a)(6)***

3 50. Bankruptcy Code section 1129(a)(6) requires that any regulatory commission
 4 having jurisdiction over the rates charged by a reorganized debtor in the operation of its
 5 business approve any rate change provided for in a plan of reorganization. *See* 11 U.S.C.
 6 § 1129(a)(6). Bankruptcy Code 1129(a)(6) is inapplicable because the Plan does not
 7 provide for a change in any rates subject to regulatory approval. As this provision is
 8 inapplicable to the Plan, the requirements of Bankruptcy Code section 1129(a)(6) have been
 9 satisfied.

10 ***7. The Plan is in the Best Interests of Creditors and Interest Holders – 11***
 11 ***U.S.C. § 1129(a)(7)***

12 51. Bankruptcy Code section 1129(a)(7) requires that a plan be in the best
 13 interests of creditors and stockholders. The best interests test focuses on individual
 14 dissenting creditors rather than classes of claims. *See Bank of Am. Nat'l Trust & Sav. Ass'n*
 15 *v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999). Under the best interests test, the court
 16 must find that each non-accepting creditor will receive or retain value that is not less than
 17 the amount such creditor would receive if the debtor were liquidated. *See 203 N. LaSalle*,
 18 526 U.S. at 441-42; *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518
 19 U.S. 213, 228 (1996). As Bankruptcy Code section 1129(a)(7) makes clear, this liquidation
 20 analysis applies only to non-accepting impaired claims or equity interests. If a class of
 21 claims or equity interests unanimously accepts the plan, the best interests test is
 22 automatically deemed satisfied for all members of that class.

23 52. The best interests test is satisfied as to each Unimpaired Class of Claims.
 24 Pursuant to Bankruptcy Code section 1126(f), each Holder of a Claim in Classes A-3 and B
 25 is deemed to have accepted the Plan. *See* 11 U.S.C. § 1126(f). Therefore, the best interests

1 test is satisfied with respect to those Classes. Further, as noted above, the best interests test
2 is deemed satisfied for all Holders of Claims in Classes A-1, A-2, C-2 and C-3 that voted to
3 accept the Plan. Because a chapter 7 liquidation of the Debtors' Estates would result in a
4 distribution that is the same as or lower than the distributions described for each Holder of a
5 Claim or Interest in Classes C-1, C-4, D and E, the best interests test is likewise satisfied as
6 to (a) each Holder of a Claim in Class C-1 that voted to reject the Plan; and (b) each Holder
7 of a Claim or Interest in Classes C-4, D and E that was deemed to have rejected the Plan.

8
9 53. Specifically, the First Lien Steering Committee believes that in the context of
10 a chapter 7 liquidation, the Debtors' secured creditors, including the First Lien Lenders,
11 would not be paid in full, and the Holders of Claims and Interests in Classes A-2, B, C-1, C-
12 2, C-3, C-4, D and E would receive no recovery. In addition, the First Lien Steering
13 Committee believes that the value of the Debtors' land assets would be materially reduced in
14 a chapter 7 liquidation in light of (i) the depressed state of the homebuilding and real estate
15 markets, (ii) the limited availability of credit, and (iii) the expedited sale process typically
16 associated with liquidations.

17
18 54. Exhibits D and E to the Disclosure Statement set forth the Going Concern
19 Analysis and Liquidation Analysis for the Debtors. The Going Concern Analysis and the
20 Liquidation Analysis demonstrate that each Holder of an Impaired Claim against or Interest
21 in the Debtors will receive or retain under the Plan, on account of such Claim or Interest,
22 property of a value, as of the Effective Date, that is not less than the amount that such
23 Holder would receive or retain if the Debtors were liquidated under chapter 7 of the
24 Bankruptcy Code.
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1 55. Based on the foregoing, the Plan satisfies the requirements of Bankruptcy
 2 Code section 1129(a)(7).

3 ***8. Acceptance by all Impaired Classes – 11 U.S.C. § 1129(a)(8)***

4 56. Bankruptcy Code section 1129(a)(8) requires that each class of impaired
 5 claims or interests accept the plan: “With respect to each class of claims or interests -
 6 (A) such class has accepted the plan; or (B) such class is not impaired under the plan.” 11
 7 U.S.C. § 1129(a)(8). Regardless of the outcome of the votes on the Plan, the Claims and
 8 Interests in Classes C-4, D and E are Impaired and deemed to reject the Plan under
 9 Bankruptcy Code section 1126(f) because they are not entitled to a recovery under the Plan,
 10 and thus section 1129(a)(8) is not satisfied. As a result, the First Lien Steering Committee
 11 must satisfy the “cram down” requirements of Bankruptcy Code section 1129(b) (as
 12 discussed below in Section E) to confirm the Plan.

13 ***9. The Plan Provides for Payment in Full of all Allowed Priority Claims – 11
 14 U.S.C. § 1129(a)(9)***

15 57. Bankruptcy Code section 1129(a)(9) requires that persons holding allowed
 16 claims entitled to priority under section 507(a) receive specified cash payments under the
 17 plan. Unless the holder of a particular claim agrees to a different treatment with respect to
 18 such claim, section 1129(a)(9) requires a plan to provide as follows:

- 19 (1) with respect to a claim of a kind specified in section 507(a)(2) or
 20 507(a)(3) of [the Bankruptcy Code], on the effective date of the plan,
 21 the holder of such claim will receive on account of such claim cash
 22 equal to the allowed amount of such claim;
- 23 (2) with respect to a class of claims of a kind specified in section
 24 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6) or 507(a)(7) of [the
 25 Bankruptcy Code], each holder of a claim of such class will receive -
- 26 (a) if such class has accepted the plan, deferred cash payments of
 27 a value, as of the effective date of the plan, equal to the
 28 allowed amount of such claim; or

(b) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

(3) with respect to a claim of a kind specified in section 507(a)(8) of [the Bankruptcy Code], the holder of such claim will receive on account of such claim regular installment payments in cash -

(a) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(b) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(c) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b));

(4) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

11 U.S.C. § 1129(a)(9).

58. In accordance with sections 1129(a)(9)(A) and (B), Article II.A of the Plan provides that all Allowed Administrative Claims shall be paid in full in Cash (i) on the later of (a) the Effective Date, (b) the date on which the Court enters an order allowing such Allowed Administrative Claim, or (c) the date on which the Reorganized Debtors or the Debtors, with the consent of the First Lien Steering Committee (and in consultation with the First Lien Agent and Second Lien Agent) and the Holder of such Allowed Administrative Claim otherwise agree, and (ii) in such amounts as (a) are incurred in the ordinary course of business by the Debtors, (b) are Allowed by the Court, (c) may be agreed upon between the Debtors, with the consent of the First Lien Steering Committee (and in consultation with the First Lien Agent and Second Lien Agent) or (d) may otherwise be required under applicable

1 law. Allowed Administrative Claims relating to liabilities incurred in the ordinary course of
 2 business by the Debtors, as debtors in possession, shall be paid by the Debtors or by the
 3 Reorganized Debtors in the ordinary course of business and subject to the conditions of the
 4 agreements governing or relating to such obligations. Thus, the Plan satisfies the
 5 requirements of Bankruptcy Code sections 1129(a)(9)(A) and (B).

6
 7 59. The Plan also satisfies the requirements of Bankruptcy Code section
 8 1129(a)(9)(C) with respect to the treatment of Priority Tax Claims. Pursuant to Article II.B
 9 of the Plan, Holders of Allowed Priority Tax Claims will be paid in full, in Cash, upon the
 10 later of (i) the Effective Date, (ii) the date upon which there is a Final Order allowing such
 11 Claim as an Allowed Priority Tax Claim, (iii) the date that such Allowed Priority Tax Claim
 12 would have been due if the Chapter 11 Cases had not been commenced, or (d) upon such
 13 other terms as may be agreed to between the Reorganized Debtors or the Debtors, with the
 14 consent of the First Lien Steering Committee (and in consultation with the First Lien Agent
 15 and Second Lien Agent), and any Holder of an Allowed Priority Tax Claim. Article II.B of
 16 the Plan further provides that, in lieu of payment in full on the Effective Date, the
 17 Reorganized Debtors or the Debtors may make deferred Cash payments, together with
 18 interest as provided in the Plan, in respect of Allowed Priority Tax Claims. Based on the
 19 foregoing, the Plan satisfies the requirements of Bankruptcy Code section 1129(a)(9).
 20
 21

22 ***10. The Plan Has Been Accepted by at Least One Impaired Class that is
 23 Entitled to Vote – 11 U.S.C. § 1129(a)(10)***

24 60. Bankruptcy Code Section 1129(a)(10) requires that, if a class of claims is
 25 impaired under a plan, at least one class of impaired claims must have voted to accept the
 26 plan. *See 11 U.S.C. § 1129(a)(10).* The Plan satisfies that requirement. Classes A-1, A-2,
 27 C-2 and C-3 have each voted to accept the Plan. These Classes, therefore, qualify as
 28

1 impaired accepting classes and satisfy the requirement of Bankruptcy Code section
 2 1129(a)(10).

3 **11. The Plan is Not Likely to be Followed by Liquidation or the Need for**
 4 **Further Financial Reorganization – 11 U.S.C. § 1129(a)(11)**

5 61. Bankruptcy Code section 1129(a)(11) requires that, as a condition precedent
 6 to confirmation, the court determine that the plan is feasible. Specifically, the court must
 7 determine that:

8 Confirmation of the plan is not likely to be followed by the liquidation, or the
 9 need for further financial reorganization, of the debtor or any successor to the
 10 debtor under the plan, unless such liquidation or reorganization is proposed in
 11 the plan.

12 11 U.S.C. § 1129(a)(11). As discussed in Article V.C of the Disclosure Statement, the Plan
 13 is feasible within the meaning of this provision.

14 62. The feasibility test set forth in section 1129(a)(11) requires the court to
 15 determine whether the plan is workable and has a reasonable likelihood of success. *See*
 16 *United States v. Energy Res. Co., Inc.*, 495 U.S. 545, 549 (1990); *Acequia, Inc. v. Clinton*
 17 (*In re Acequia, Inc.*), 787 F.2d 1352, 1364 (9th Cir. 1986) (finding that a plan met the
 18 feasibility requirement under section 1129(a)(11) where the debtor presented evidence
 19 demonstrating that the plan had a reasonable probability of success); *Kane v. Johns-Manville*
 20 *Corp* (*In re Johns-Manville Corp.*), 843 F.2d 636, 649 (2d Cir. 1988).

21 63. On feasibility, the Ninth Circuit has held that “[t]he purpose of section
 22 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and
 23 equity security holders more under a proposed plan than the debtor can possibly attain after
 24 confirmation.” *Pizza of Haw., Inc. v. Shakey’s, Inc.* (*In re Pizza of Haw., Inc.*), 761 F.2d
 25 1374, 1382 (9th Cir. 1985) (quoting 5 *Collier on Bankruptcy* ¶ 1129.02[11], at 1129-34
 26 (15th ed. rev. 1984)). Nevertheless, “only ‘a relatively low threshold of proof [is] necessary

1 to satisfy the feasibility requirement.”” *In re Sagewood Manor Assocs. Ltd. P’ship*, 223
 2 B.R. 756, 762 (Bankr. D. Nev. 1998) (quoting *Berkely Fed. Bank & Trust v. Sea Garden*
 3 *Motel & Apartments (In re Sea Garden Motel and Apartments)*, 195 B.R. 294, 305 (D.N.J.
 4 1996) (alteration in original)). “The key element of feasibility is whether there exists a
 5 reasonable probability that the provisions of the plan of reorganization can be performed.”
 6 *Id.* “[T]he feasibility standard is whether the plan offers a reasonable assurance of success.
 7 Success need not be guaranteed.” *In re Johns-Manville Corp.*, 843 F.2d at 649; *see also In*
re U.S. Truck Co., 47 B.R. 932, 944 (E.D. Mich. 1985) (“Feasibility does not, nor can it,
 8 require the certainty that a reorganized company will succeed.”), *aff’d*, 800 F.2d 581 (6th
 9 Cir. 1986); *In re WorldCom, Inc.*, 2003 Bankr. LEXIS 1401 at *168 (“The feasibility test set
 10 forth in section 1129(a)(11) requires the Court to determine whether the Plan is workable
 11 and has a reasonable likelihood of success.”); *In re One Times Square Assocs. Ltd. P’ship*,
 12 159 B.R. 695, 709 (Bankr. S.D.N.Y. 1993), *aff’d* 165 B.R. 773 (S.D.N.Y.), *aff’d* 41 F.3d
 13 1502 (2d Cir. 1994) (“It is not necessary that the success be guaranteed, but only that the
 14 plan present a workable scheme of reorganization and operation from which there may be a
 15 reasonable expectation of success.”) (quoting 5 *Collier on Bankruptcy* ¶ 1129.02[11], at
 16 1129-54 (15th ed. rev. 1992)); *In re Prudential Energy Co.*, 58 B.R. 857, 862 (Bankr.
 17 S.D.N.Y. 1986) (“Guaranteed success in the stiff winds of commerce without the protection
 18 of the [Bankruptcy] Code is not the standard under § 1129(a)(11).”).

24 64. The key element of feasibility is whether there exists a reasonable probability
 25 that the provisions of the plan can be performed. The purpose of the feasibility test is to
 26 protect against visionary or speculative plans. *See Pizza of Haw., Inc.*, 761 F.2d at 1382.
 27 “Just as speculative prospects of success cannot sustain feasibility, speculative prospects of
 28

failure cannot defeat feasibility. The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds.” *In re Drexel I*, 138 B.R. at 762.

65. Applying the foregoing standards of feasibility, courts have identified the following factors as probative:

- (i) the adequacy of the capital structure;
- (ii) the earning power of the business;
- (iii) economic conditions;
- (iv) the ability of management;
- (v) the probability of the continuation of the same management; and
- (vi) any other related matters which will determine the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.

See *In re Sagewood Manor Assocs. Ltd. P'ship*, 223 B.R. at 763; *In re Trans Max Techs., Inc.*, 349 B.R. 80, 92 (Bankr. D. Nev. 2006); see also *In re Leslie Fay Cos.*, 207 B.R. 764, 789 (Bankr. S.D.N.Y. 1997) (citing 7 *Collier on Bankruptcy* ¶ 1129.LH[2], at 1129-82 (15th ed. rev. 1996)); *In re Texaco*, 84 B.R. 893, 910 (Bankr. S.D.N.Y 1988); *Prudential Energy*, 58 B.R. at 862-63. The foregoing list is neither exhaustive nor exclusive. *In re Sagewood Manor Assocs. Ltd. P'ship*, 223 B.R. at 763; *Drexel I*, 138 B.R. at 763. The Plan satisfies these standards of feasibility.

66. For purposes of determining whether the Plan satisfies the above-described feasibility standards, the First Lien Steering Committee has analyzed the Reorganized Debtors’ ability to fulfill their obligations under the Plan and retain sufficient liquidity and capital resources to conduct their businesses. As part of this analysis, the First Lien Steering Committee has prepared financial projections for the Reorganized Debtors for the years

1 2010 through 2014 (the “Projections”). The Projections are attached to the Disclosure
 2 Statement as Exhibit D and are discussed in detail in Articles V.C and V.D of the Disclosure
 3 Statement. Based upon the information contained in the Disclosure Statement and the
 4 Projections, the First Lien Steering Committee believes that the Reorganized Debtors will
 5 have the financial capability to satisfy their obligations following the Effective Date
 6 pursuant to the Plan.

7 67. Based upon the foregoing, the Plan is feasible because there is a reasonable
 8 likelihood that the Reorganized Debtors will meet their financial obligations under the Plan
 9 in the ordinary course of business, and because confirmation of the Plan is not likely to be
 10 followed by the liquidation or need for further financial reorganization of the Reorganized
 11 Debtors. The Plan therefore satisfies the feasibility standard of Bankruptcy Code section
 12 1129(a)(11).

13 ***12. The Plan Provides for Full Payment of all Statutory Fees – 11 U.S.C.
 14 § 1129(a)(12)***

15 68. Section 1129(a)(12) requires the payment of “[a]ll fees payable under section
 16 1930 [title 28, the United States Code], as determined by the court at the hearing on
 17 confirmation of the plan....” 11 U.S.C. § 1129(a)(12). Bankruptcy Code section 507
 18 provides that “any fees and charges assessed against the estate under [section 1930,] chapter
 19 123 of title 28” are afforded priority as administrative expenses. *Id.* at § 507(a)(2). In
 20 accordance with Bankruptcy Code sections 507 and 1129(a)(12), Article II.A of the Plan
 21 provides that all such fees and charges will be paid in full, in Cash. Thus, the Plan satisfies
 22 the requirements of Bankruptcy Code section 1129(a)(12).

1 ***13. 11 U.S.C. § 1129(a)(13) is Inapplicable as the Debtors Have No Retiree
2 Obligations***

3 69. Bankruptcy Code section 1129(a)(13) requires a plan to provide for retiree
4 benefits at levels established pursuant to Bankruptcy Code section 1114. *See* 11 U.S.C.
5 § 1129(a)(13). Because the Debtors have no retiree benefit obligations, Bankruptcy Code
6 section 1129(a)(13) is inapplicable to the Plan.

7 ***14. The Debtors Do Not Need to Pay Domestic Support Obligations – 11 U.S.C.
8 § 1129(a)(14)***

9 70. Bankruptcy Code section 1129(a)(14) requires individual chapter 11 debtors
10 who are required by judicial or administrative order, or by statute, to pay a domestic support
11 obligation. *See* 11 U.S.C. § 1129(a)(14). Each of the Debtors are business entities and are
12 not required to pay domestic support obligations. Accordingly, Bankruptcy Code section
13 1129(a)(14) is not implicated by the Plan.

14 ***15. The Debtors Do Not Need to Pay Five Years' Worth of Disposable Income
15 to Unsecured Creditors – 11 U.S.C. § 1129(a)(15)***

16 71. Bankruptcy Code section 1129(a)(15) requires either that an individual
17 chapter 11 debtor pay all unsecured claims in full or that the debtor's plan devote an amount
18 equal to five years' worth of the debtor's projected disposable income to unsecured
19 creditors. *See* 11 U.S.C. § 1129(a)(15). Each of the Debtors are business entities.
20 Accordingly, Bankruptcy Code section 1129(a)(15) is not implicated by the Plan.

21 ***16. The Plan Does Not Provide for Transfers of Property by Nonprofit Entities
22 – 11 U.S.C. § 1129(a)(16)***

23 72. Under Bankruptcy Code section 1129(a)(16), all transfers under a plan must
24 be made in accordance with "any applicable provisions of nonbankruptcy law that govern
25 the transfer of property by a corporation or trust that is not a moneyed, business, or
26 commercial corporation or trust." 11 U.S.C. § 1129(a)(16). Although this provision could

1 be read to apply to all transfers (regardless of whether the debtor is a non-profit entity),
 2 Congress was clear in the legislative history that this provision was meant to “restrict the
 3 authority of a trustee to use, sell, or lease property by a nonprofit corporation or trust.” H.R.
 4 REP. No. 109-31, 109th Cong., 1st Sess. 145 (2005).

5 73. Each of the Debtors is a moneyed, business or commercial corporation,
 6 partnership or limited liability company. Accordingly, Bankruptcy Code section
 7 1129(a)(16) is not implicated by the Plan.

8 **E. The Plan Satisfies the “Cram Down” Requirements Under Bankruptcy Code
 9 Section 1129(b)**

10 74. Bankruptcy Code Section 1129(b) provides a mechanism for confirmation of
 11 a plan in circumstances where the plan is not accepted by all impaired classes of claims
 12 and/or equity interests. This mechanism is commonly referred to as “cram down.” Section
 13 1129(b) provides in pertinent part:

14 Notwithstanding section 510(a) of [the Bankruptcy Code], if all of the
 15 applicable requirements of [section 1129(a) of the Bankruptcy Code] other than [the requirement contained in section 1129(a)(8) that a plan must be
 16 accepted by all impaired classes] are met with respect to a plan, the court, on
 17 request of the proponent of the plan, shall confirm the plan notwithstanding
 18 the requirements of such paragraph *if the plan does not discriminate unfairly,*
and is fair and equitable, with respect to each class of claims or interests that
is impaired under, and has not accepted, the plan.

19 21 U.S.C. § 1129(b)(1) (emphasis added). Thus, under Bankruptcy Code section 1129(b),
 20 the court may “cram down” a plan over the deemed rejection by impaired classes of claims
 21 or equity interests that receive no distributions under the plan as long as the plan does not
 22 “discriminate unfairly” and is “fair and equitable” with respect to such classes.

1 **I. The Plan Does Not Discriminate Unfairly with Respect to the Rejecting
2 Classes**

3 75. Bankruptcy Code section 1129(b)(1) does not prohibit discrimination
4 between classes; it prohibits only discrimination that is *unfair*. *See In re 11,111, Inc.*, 117
5 B.R. 471, 478 (Bankr. D. Minn. 1990). The weight of judicial authority holds that a plan
6 unfairly discriminates in violation of Bankruptcy Code section 1129(b) only if similar
7 classes are treated differently without a reasonable basis for the disparate treatment. *See In*
8 *re Johnston*, 21 F.3d at 328 (holding that a plan's different treatment and classification did
9 not discriminate unfairly because "there were reasonable, nondiscriminatory reasons" for the
10 treatment); *see also In re Buttonwood Partners, Ltd.*, 111 B.R. 57 (Bankr. S.D.N.Y. 1990);
11 *Johns-Manville*, 68 B.R. 618 (Bankr. S.D.N.Y. 1986). The Ninth Circuit has stated that

12 [*d*]iscrimination between classes must satisfy four criteria to
13 be considered fair under 11 U.S.C. § 1129(b): (1) the
14 discrimination must be supported by a reasonable basis;
15 (2) the [*plan proponent*] could not confirm or consummate the
16 Plan without the discrimination; (3) the discrimination is
17 proposed in good faith; and (4) the degree of the
18 discrimination is directly related to the basis or rationale for
the discrimination.

19 *Liberty Nat'l Enters. V. Ambanc La Mesa Ltd. P'ship (In re Ambanc La Mesa Ltd. P'ship.)*,
20 115 F.3d 650, 656 (9th Cir. 1997) (citing *Amfac Distrib. Corp. v. Wolff (In re Wolff)*, 22
21 B.R. 510, 511-12 (B.A.P. 9th Cir. 1982)).

22 76. The Plan does not "discriminate unfairly" with respect to Impaired Classes of
23 Claims and Interests that are deemed to have rejected the Plan. Class C-4 (Subordinated
24 Claims) and Class D (Old Equity Interests) consist of (i) Interests (Class D) or (ii) Claims
25 that have been subordinated to other Classes of Claims receiving distributions under the Plan
26 pursuant to Bankruptcy Code section 510 (Class C-4). These Claims and Interests are
27 dissimilar in their legal nature from, and subordinate to, the Secured and Unsecured Claims

receiving distributions under the Plan. Further, there is a reasonable basis for the disparate treatment of the Claims in Class E (Intercompany Claims), and the claims are treated appropriately according to the differences. Specifically, the treatment of Claims in Class E is appropriate in light of the fact that the Plan calls for the substantive consolidation of the Debtors' Estates, without which resolution of these cases would be too complex for the First Lien Steering Committee to confirm a plan. The effect of the substantive consolidation of the Debtors' Estates will be that each of the multiple Debtor's Estates will be deemed to be consolidated into a single Estate, and the Intercompany Claims will therefore be deemed eliminated. Thus, the different treatment is precisely proportional to the reasonable basis for differentiating among such claims. Accordingly, the treatment of the Claims in Class E is reasonable, appropriate, and necessary.

77. Under the foregoing standards, the Plan does not “discriminate unfairly,” as the Holders of Claims and Interests, whose Classes rejected the Plan, shall be treated in the exact same manner as the other Claims or Interests in such Classes.

2. The Plan is Fair and Equitable with Respect to the Rejecting Classes and the Classes that Voted to Reject the Plan

78. Class C-1 voted to reject the Plan. Classes C-4, D and E are deemed to have rejected the Plan. The Plan, however, is fair and equitable with respect to these Classes. Bankruptcy Code section 1129(b) defines the phrase “fair and equitable” as follows:

(a) As to secured creditors: Either (i) each impaired secured creditor retains its liens securing its secured claim and receives on account of its secured claim deferred cash payments having a present value equal to the amount of its allowed secured claim, (ii) each impaired secured creditor realizes the “indubitable equivalent” of its allowed secured claim or (iii) the property is sold free and clear of liens with such liens to attach to the proceeds of the sale and the treatment of such liens on proceeds is provided in clause (i) or (ii) of this [section 1129(b)].

- (b) As to unsecured creditors: Either (i) each impaired unsecured creditor receives or retains under the plan property of a value equal to the amount of its allowed claim or (ii) the holders of claims and interests that are junior to the claims of the dissenting class will not receive any property under the plan.
 - (c) As to equity interest holders: Either (i) each holder of an equity interest will receive or retain under the plan property of a value equal to the greatest of the fixed liquidation preference to which such holder is entitled, the fixed redemption price to which such holder is entitled or the value of the interest or (ii) the holder of an interest that is junior to the nonaccepting class will not receive or retain any property under the plan.

11 U.S.C. § 1129(b)(2). In the instant case, the “fair and equitable” rule is satisfied as to the Holders of (i) Interests in Class D and (ii) Claims in Classes C-1, C-4 and E because, as a result of the valuation of the Debtors, these Holders are not entitled to any recovery under the Plan, and no Classes junior to Classes C-1, C-4, D or E will receive any distributions or retain any property under the Plan.

**3. *The Purchase of General Unsecured Claims by the Holders of First Lien
Lender Secured Claims Does Not Violate Bankruptcy Code Section 1129(b)***

79. Articles VII.F and VII.G of the Plan provide that the Holders of First Lien Lender Secured Claims will use the \$1.5 million Cash portion of their recovery under the Plan to acquire those General Unsecured Claims listed on Exhibit H to the Disclosure Statement (the “Claims Purchase Schedule”) to the extent that certain conditions regarding the purchase of such Claims are satisfied. The First Lien Steering Committee believes that the purchase of the General Unsecured Claims listed on the Claims Purchase Schedule does not violate Bankruptcy Code section 1129(b).

a. *The Purchase of General Unsecured Claims Constitutes Permissible Claims Trading and Does Not Implicate Bankruptcy Code Section 1129(b)*

80. The First Lien Steering Committee believes that the purchase of the General Unsecured Claims listed on the Claims Purchase Schedule does not implicate the provisions

1 of Bankruptcy Code section 1129(b). As set forth in the Disclosure Statement, the First Lien
 2 Steering Committee believes that the purchase of General Unsecured Claims provided for
 3 under Articles VII.F and VII.G of the Plan constitutes permissible claims trading under the
 4 Bankruptcy Code, the Bankruptcy Rules and applicable case law.
 5

6 81. Neither the Bankruptcy Code nor the Bankruptcy Rules prohibit the purchase
 7 or sale of claims. *See Official Unsecured Creditors' Comm. v. Stern (In re SPM Mfg.*
 8 *Corp.*), 984 F.2d 1305, 1314 (1st Cir. 1993) (noting that "neither the [Bankruptcy Code] nor
 9 the [Bankruptcy Rules] prohibit or discourage creditors from receiving cash from
 10 nondebtors in exchange for their claims"). In addition, Bankruptcy Rule 3001(e)(2) limits
 11 the role of bankruptcy courts in the claims transfer process to resolving disputes regarding
 12 transfers of claims. *See Resurgent Capital Servs. v. Burnett (In re Burnett)*, 306 B.R. 313,
 13 319 (B.A.P. 9th Cir. 2004), *aff'd*, 435 F.3d 971 (9th Cir. 2006) (explaining that Bankruptcy
 14 Rule 3001(e)(2) was amended to limit the bankruptcy court's role to adjudicating disputes
 15 over transfers of claims); *Viking Assocs., L.L.C. v. Drewes (In re Olson)*, 120 F.3d 98, 102
 16 (8th Cir. 1997) (noting that "[w]here there is no dispute [with respect to a claims transfer],
 17 there is no longer any role for the court"). For purposes of Bankruptcy Rule 3001(e)(2), a
 18 "dispute" regarding a transfer of a claim exists only if the alleged transferor files an
 19 objection to the transfer. *See Id.* at 102. Bankruptcy Rule 3001(e)(2) does not require the
 20 parties to a claims transfer to disclose the terms of such transfer to the bankruptcy court. *See*
 21 *In re Burnett*, 306 B.R. at 318. Finally, there is no requirement in the Bankruptcy Code or
 22 the Bankruptcy Rules that a non-debtor that purchases claims from one member of a class of
 23 creditors must seek to purchase the claims of all of the members of that class.
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1 82. Based on the foregoing, the First Lien Steering Committee believes that the
 2 Holders of First Lien Lender Secured Claims (i) are permitted to purchase the Claims listed
 3 on the Claim Purchase Schedule under the Bankruptcy Code and the Bankruptcy Rules and
 4 (ii) have the discretion to purchase only a portion of the total number of General Unsecured
 5 Claims. Moreover, absent an objection to the purchase of a Claim, the First Lien Steering
 6 Committee submits that the Claim purchase procedures contemplated by the Plan do not
 7 require the approval of the Court, and that the First Lien Lenders are authorized to
 8 implement the Claim purchase procedures in accordance with Article VII.G. of the Plan.
 9 The First Lien Steering Committee therefore believes that Bankruptcy Code section 1129(b)
 10 does not apply to the purchase of Claims by the First Lien Lenders under the Plan.

13 ***b. The Purchase of General Unsecured Claims by the Holders of First Lien
 14 Lender Secured Claims Does Not Violate Bankruptcy Code Section 1129(b)
 15 Because the Holders of First Lien Lender Secured Claims are Permitted to
 16 Share their Recovery Under the Plan***

17 83. Even if the purchase of the Claims listed on the Claims Purchase Schedule
 18 does not constitute permissible claims trading, the First Lien Steering Committee believes
 19 that the purchase of such Claims is entirely consistent with the requirements of Bankruptcy
 20 Code section 1129(b) and relevant case law. Both relevant case law and the statute itself
 21 support the ability of the holders of secured claims to gift a portion of their own recovery to
 22 certain junior classes. As one court noted:

23 Any enhanced value received by holders of [junior classes] on account of
 24 contributions from [secured creditors] is not a treatment of these Claims
 25 under the plan and does not constitute unfair discrimination The greater
 26 value received by a [junior class] does not violate the Bankruptcy Code
 27 because [such greater value is] the result of [secured] creditors . . . voluntarily
 sharing their recoveries under the Plan [and thus] is not the result of the
 Debtors' distribution of estate property to such creditors.

28 See *In re Worldcom, Inc.*, 2003 Bankr. LEXIS 1401 at *178.

1 84. A majority of courts throughout the country have held that a plan provision
 2 pursuant to which secured creditors gift a portion of their recovery to junior classes of
 3 claims (i) does not implicate, let alone violate, the absolute priority rule, and (ii) to the
 4 extent that only a portion of the holders of claims in such junior classes receive a gift from
 5 holders of senior claims, such gift does not constitute unfair discrimination. *See Official*
 6 *Unsecured Creditors' Comm. v. Stern (In re SPM Mfg. Corp.)*, 984 F.2d 1305, 1312 (1st Cir.
 7 1993) (The absolute priority rule "does not come into play until all valid liens on the
 8 property are satisfied."); *In re World Health Alternatives, Inc.*, 344 B.R. 291, 297-98 (Bankr.
 9 D. Del. 2006) (approving, in a situation similar to this case, a carve-out provision in a pre-
 10 plan settlement agreement whereby the secured creditor gave a gift to the general unsecured
 11 creditors); *In re Protocol Servs., Inc.*, Nos. 05-6782 JM11 – 05-6786 JM11, 2005 Bankr.
 12 LEXIS 3191, at *5 (Bankr. S.D. Cal. Dec. 23, 2005) (sharing by the under-secured creditors
 13 of the proceeds of their collateral with a junior class was "an acceptable carve-out
 14 provision"); *In re Union Fin. Servs. Group, Inc.*, 303 B.R. 390, 423 (Bankr. E.D. Mo. 2003)
 15 (holding that a plan provision that provided for the payment of a portion of the secured
 16 creditors' collateral to unsecured creditors did not affect an unfair discrimination); *In re*
 17 *Genesis Health Ventures, Inc.*, 266 B.R. 591, 618 (Bankr. D. Del. 2001) (secured creditors
 18 "are free to allocate [value otherwise distributable to them] without violating the 'fair and
 19 equitable' requirement"). Thus, where, as here, holders of secured claims agree to share a
 20 portion of the recovery they were entitled to receive on account of their claims with, among
 21 others, certain holders of general unsecured claims, the absolute priority rule is neither
 22 implicated nor violated, and there is no unfair discrimination for purposes of Bankruptcy
 23 Code section 1129(b).

1 **F. The Limited Release, Exculpation, and Injunction Provisions of the Plan Should
2 be Approved**

3 85. The Plan provides for (i) the release of certain Claims and Causes of Action
4 of the Debtors and their Estates against the Released Parties (as defined below), (ii) the
5 release of certain avoidance actions of the Debtors against the Rhodes Entities, (iii) the
6 voluntary release by certain First Lien Lenders of certain Claims and Causes of Action
7 against all other First Lien Lenders, (iv) the exculpation of claims for certain parties, and
8 (v) a permanent injunction precluding Holders of Claims or Interests from asserting those
9 Claims or Interests, or claims or actions based upon such Claims or Interests, against the
10 Debtors. These releases are proper because, among other things, such releases are the
11 product of arm's length negotiations and have been critical to the formulation of a
12 consensual Plan. Moreover, the releases are integral to the Mediation Settlement embodied
13 in the Plan and are appropriately limited.

14 ***I. Exculpation***

15 86. Pursuant to Article VIII.G of the Plan (the "Exculpation"), no Exculpated
16 Party shall have or incur, and each Exculpated Party is released and exculpated from any
17 Claim, obligation, Cause of Action, or liability to one another or to any Exculpating Party
18 for any Exculpated Claim, except for gross negligence, willful misconduct or fraud, but in
19 all respects such Entities shall be entitled to reasonably rely upon the advice of counsel with
20 respect to their duties and responsibilities pursuant to the Plan. In addition, Article VIII.G
21 of the Plan provides that the Debtors, the First Lien Steering Committee and the
22 Reorganized Debtors (and each of their respective agents, members, directors, officers,
23 employees, advisors, and attorneys) have, and upon confirmation of the Plan shall be
24 deemed to have, participated in good faith and in compliance with the applicable provisions

1 of the Bankruptcy Code with regard to the distributions of the Securities pursuant to the
 2 Plan, and therefore are not, and on account of such distributions shall not be, liable at any
 3 time for the violation of any applicable law, rule, or regulation governing the solicitation of
 4 acceptances or rejections of the Plan or such distributions made pursuant to the Plan.
 5

6 87. The Exculpation is limited to those parties that were instrumental to the
 7 Debtors' restructuring efforts and to the formulation of the Plan, and the Exculpation is
 8 limited solely to acts in connection with, related to, or arising out of the Chapter 11 Cases.
 9 Thus, the Exculpation, which "generally follows the text that has become standard . . . , is
 10 sufficiently narrow to be unexceptionable." *In re Oneida Ltd.*, 351 B.R. 79, 94 n.22 (Bankr.
 11 S.D.N.Y. 2006); *see also* (*Upstream Energy Servs. v. Enron Corp. (In re Enron Corp.)*, 326
 12 B.R. 497, 504 (S.D.N.Y. 2005)).
 13

14 88. Further, the Exculpation is appropriately limited to a qualified immunity for
 15 acts of negligence, but does not relieve any party of gross negligence, willful misconduct or
 16 fraud. *See W.R. Huff Asset Mgmt Co., LLC v. PWS Holding Corp. (In re PWS Holding*
 17 *Corp.)*, 228 F.3d 224, 246-47 (3d Cir. 2000) (similar exculpation provision reflecting
 18 Bankruptcy Code's limitation of liability did not violate third party release prohibition of
 19 section 524(e)); *DJS Props., L.P. v. Simplot*, 397 B.R. 493, 502 (D. Id. 2008) (approving
 20 plan with exculpation provision releasing estate representative for all claims and causes of
 21 action except for fraud, breach of fiduciary duties, gross negligence, or willful misconduct).
 22

23 89. Exculpation for participating in the plan process is appropriate where plan
 24 negotiation could not have occurred without protection from liability. As recognized by
 25 several courts, where a plan of reorganization requires the settlement of numerous complex
 26 issues, protection of third parties against legal exposure may be a key component of the
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1 settlement. *DJS Props., L.P.*, 397 B.R. at 507 (holding that the exculpation and
 2 indemnification provisions were reasonable in light of threatened suit against the estate
 3 representative), *SEC v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burham*
 4 *Lambert Group, Inc.)*, 960 F.2d 285, 293 (2d Cir. 1992) (“Drexel II”); *In re Enron Corp.*,
 5 326 B.R. at 503 (excising similar exculpation provision would “tend to unravel the entire
 6 fabric of the Plan, and would be inequitable to all those who participated in good faith to
 7 bring it into fruition”); *In re Metricom, Inc.*, 275 B.R. 364, 371 (Bankr. N.D. Cal. 2002)
 8 (noting “that the Code does not prohibit indemnity/contribution or exculpation provisions,
 9 and that there is no statutory or binding bankruptcy case law basis upon which to establish a
 10 *per se* rule against such protections”).

13 **2. *Injunction***

14 90. Article VIII.H of the Plan provides that, except as otherwise expressly
 15 provided in the Plan or for obligations issued pursuant to the Plan, all Entities who have
 16 held, hold, or may hold Claims against the Debtors, and all Entities holding Interests, are
 17 permanently enjoined, from and after the Effective Date, from: (1) commencing or
 18 continuing in any manner any action or other proceeding of any kind against the Debtors or
 19 Reorganized Debtors on account of or in connection with or with respect to any such Claims
 20 or Interests; (2) enforcing, attaching, collecting, or recovering by any manner or means any
 21 judgment, award, decree or order against the Debtors or Reorganized Debtors on account of
 22 or in connection with or with respect to any such Claims or Interests; (3) creating,
 23 perfecting, or enforcing any encumbrance of any kind against the Debtors or Reorganized
 24 Debtors or the property or Estates of the Debtors or Reorganized Debtors on account of or in
 25 connection with or with respect to any such Claims or Interests; (4) asserting any right of
 26 setoff, subrogation, or recoupment of any kind against any obligation due from the Debtors
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1 or Reorganized Debtors or against the property or Estates of the Debtors or Reorganized
 2 Debtors on account of or in connection with or with respect to any such Claims or Interests
 3 unless such Holder has filed a motion requesting the right to perform such setoff on or
 4 before the Confirmation Date, and notwithstanding any indication in a Proof of Claim or
 5 Interest or otherwise that such Holder asserts, has, or intends to preserve any right of setoff
 6 pursuant to Bankruptcy Code section 553 or otherwise (provided, that, to the extent the
 7 Rhodes Entities Claims are Allowed, the Rhodes Entities, without the need to file any such
 8 motion, shall retain the right to assert a setoff against any Claims or Causes of Action that
 9 the Reorganized Debtors or Litigation Trust may assert against the Rhodes Entities, with the
 10 Reorganized Debtors and Litigation Trust, as applicable, reserving the right to challenge the
 11 propriety of any such attempted setoff, with any such challenge to be resolved by the Court);
 12 and (5) commencing or continuing in any manner any action or other proceeding of any kind
 13 on account of or in connection with or with respect to any such Claims or Interests released
 14 or settled pursuant to the Plan.

18 91. The injunction is necessary to preserve and enforce the releases and
 19 discharges granted by the Plan and is narrowly tailored to achieve that purpose.

20 **3. *Release Provisions***

21 92. Article VIII.D of the Plan provides that, for good and valuable consideration,
 22 including the facilitation of the expeditious reorganization of the Debtors and the
 23 implementation of the restructuring contemplated by the Plan, and as part of the Mediation
 24 Settlement, (i) the First Lien Lenders, (ii) the First Lien Steering Committee, (iii) the Second
 25 Lien Lenders, (iv) the predecessors, successors and assigns of the entities listed in
 26 (i) through (iii), (v) the Creditors' Committee and the members thereof, (vi) the subsidiaries,
 27 affiliates, officers, members, directors, principals, employees, agents, financial advisors,

1 attorneys, accountants, investment bankers, consultants, representatives, and other
2 Professionals of the entities listed in (i) through (v), (vii) the Debtors' officers, employees
3 (including Thomas Robinson and Joseph Schramm) and Professionals, as of the Petition
4 Date, and (viii) Paul Huygens (collectively, the "Released Parties") shall be deemed released
5 from any and all Claims and Causes of Action related to, among other things, the Debtors,
6 the Debtors' restructuring and the Chapter 11 Cases, which Claims and Causes of Action
7 arose prior to the Effective Date.

9 93. In addition, Article VIII.E of the Plan provides that the Rhodes Entities shall
10 be deemed released from avoidance actions under chapter 5 of the Bankruptcy Code with
11 respect to transfers made by the Debtors to the Rhodes Entities during the two years prior to
12 the Petition Date. The release granted to the Rhodes Entities is specifically limited,
13 however, to apply only to transfers expressly set forth in the Debtors' Schedules as of
14 August 1, 2009, or as disclosed in Attachment B to the Mediation Term Sheet.

15 94. Finally, Article VIII.F of the Plan provides that, pursuant to Bankruptcy Rule
16 9019, each of the First Lien Lenders that votes on the Plan may elect to release the other
17 First Lien Lenders, for good and valuable consideration, on and after the Effective Date,
18 from all Claims and Causes of Action that such First Lien Lender would have been entitled
19 to assert against any other First Lien Lender electing to grant a release prior to the Effective
20 Date relating to, among other things, the First Lien Credit Agreement, the First Lien Lender
21 Claims, the Debtors, the Chapter 11 Cases, the restructuring of the First Lien Lender Claims,
22 or the Plan and the Disclosure Statement. Any release granted pursuant to Article VIII.F of
23 the Plan does not apply, however, to claims or liabilities arising out of any act or omission
24 that constitutes gross negligence or willful misconduct.
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1 95. The release provisions contained in Articles VIII.D, VIII.E and VIII.F of the
 2 Plan were agreed to as part of the Mediation Settlement that is embodied in the Plan. As
 3 discussed more fully below, the First Lien Steering Committee believes that the Mediation
 4 Settlement is in the best interests of the Debtors and all creditor constituencies and
 5 represents the best possible restructuring alternative for the Debtors' businesses. Among
 6 other things, the Mediation Settlement allows for the resolution of (i) potential preference
 7 actions relating to transfers in excess of \$9 million to certain of the Rhodes Entities within
 8 the one year period prior to the Petition Date that would have been heavily contested by the
 9 Rhodes Entities and (ii) potential fraudulent conveyance actions held by the Debtors' Estates
 10 against the Rhodes Entities that likewise would have been heavily contested by the Rhodes
 11 Entities. Based on the foregoing, the First Lien Steering Committee believes that the release
 12 provisions contained in Articles VIII.D, VIII.E and VIII.F of the Plan are supported by
 13 adequate consideration and should be approved as integral components of the Mediation
 14 Settlement.

15 96. In addition, the First Lien Steering Committee notes that the releases granted
 16 by the Debtors pursuant to Articles VIII.D and VIII.E of the Plan are limited solely to
 17 Claims or Causes of Action that belong to the Debtors. *In re Oneida Ltd.*, 351 B.R. at 94
 18 n.21 ("Under the Plan, the Debtors also released their own claims against third parties, but
 19 these do not raise any 'third-party release' issues of the type discussed here.") As no third-
 20 party rights are impacted by these provisions, and a debtor is authorized to settle claims in
 21 the plan of reorganization, this provision is consistent with applicable law.

22 97. A plan that proposes to release a claim or action that belongs to the debtor is
 23 considered a "settlement" for purposes of satisfying Bankruptcy Code section
 24

1 1123(b)(3)(A). *See, e.g., In re WCI Cable, Inc.*, 282 B.R. 457, 469 (Bankr. D. Ore. 2002)
 2 (“I find that the release and injunction provisions of . . . the WCI plan are submitted for
 3 approval by the court pursuant to § 1123(b)(3)(A) and [Rule 9019(a) of the Federal Rules of
 4 Bankruptcy Procedure]”); *Resolution Trust Corp. v. Best Prods. Co. (In re Best Prods. Co.)*,
 5 68 F.3d 26, 33 (2d Cir. 1995) (finding that § 1123(b)(3)(A) and Rule 9019(a) applied); *In re
 6 WorldCom, Inc.*, 2003 Bankr. LEXIS 1401 at *117 (same); *In re Cellular Info. Sys.*, 171
 7 B.R. 926, 947-948 (Bankr. S.D.N.Y. 1994) (same). In reviewing releases of a debtor’s
 8 claims pursuant to Bankruptcy Code section 1123(b)(3)(A), the court should be guided by
 9 the “reasonable business judgment” standard of Bankruptcy Rule 9019. *See In re
 10 WorldCom, Inc.*, 2003 Bankr. LEXIS 1401 at * 117; *In re WCI Cable, Inc.*, 282 B.R. at 474;
 11 *Drexel I*, 138 B.R. at 750-760.

12 98. It is also clear that the release may include not only claims assertable directly
 13 by the debtor, but also claims assertable on behalf of, or derivative of the rights of, the
 14 debtor, i.e., all claims belonging to the estate or that may be brought by the chapter 11
 15 debtor (including shareholder derivative actions, fraudulent conveyance claims, preference
 16 actions, and other similar types of actions subject to settlement by the debtor). *See Hasell v.
 17 PWS Holding Corp. (In re PWS Holding Corp.)*, 303 F.3d 308, 315 (3d Cir. 2002); *In re
 18 WCI Cable, Inc.*, 282 B.R. at 474 (confirming settlement as a reasonable exercise of
 19 business judgment); *In re Texaco*, 84 B.R. 893, 900 (Bankr. S.D.N.Y. 1988); *In re Allegheny
 20 Int’l, Inc.*, 118 B.R. 282, 311-312 (Bankr. W.D. Pa. 1990); *Huddleston v. Nelson Bunker
 21 Hunt Trust Estate*, 117 BR. 231, 233-34 (N.D. Tex. 1990) (confirming plan containing
 22 release of claims against banks to the extent they were derivative of the debtor’s claims).

1 99. Over the course of the Chapter 11 Cases, the parties receiving releases
 2 pursuant to Articles VIII.D, VIII.E and VIII.F of the Plan have contributed substantial value
 3 to the Debtors and the formulation of the Plan. The efforts of the such parties in reaching
 4 the Mediation Settlement and negotiating and ultimately formulating the Plan enabled the
 5 First Lien Steering Committee to file the Plan. The recoveries negotiated by the key
 6 constituencies in the Chapter 11 Cases are better than would likely be available if other
 7 alternatives were pursued.

8 100. Significantly, and as evidenced by the voting results confirmed in the
 9 Osborne Declaration, the Plan was approved by a substantial majority of Holders of Claims
 10 voting on the Plan and no creditor has objected to the release provisions contained in
 11 Articles VIII.D, VIII.E and VIII.F of the Plan.

12 **G. The Mediation Settlement Embodied in the Plan Should be Approved**

13 101. The First Lien Steering Committee believes that the Mediation Settlement
 14 embodied in the Plan is reasonable and should be approved under Bankruptcy Rule 9019. In
 15 order to determine whether a compromise may be approved under Bankruptcy Rule 9019,
 16 four factors must be considered: (i) the probability of success of the litigation; (ii) the
 17 difficulties, if any, to be encountered in the matter of collection; (iii) the complexity of the
 18 litigation involved, and the expense, inconvenience and delay necessarily attending it; and
 19 (iv) the paramount interest of the creditors and a proper deference to their reasonable views.

20 See, e.g., *Martin v. Kane (In re A&C Props.)*, 784 F.2d 1377, 1381 (9th Cir. 1986). A
 21 compromise may be approved even if all four of the factors do not favor the compromise so
 22 long as the factors weigh in favor of the compromise when taken as a whole. See *In re Pac.*
 23 *Gas and Elec. Co.*, 304 B.R. 395, 416 (Bankr. N.D. Cal. 2004). In addition, a compromise
 24 does not have to be the best compromise that could have possibly been obtained but, instead,

1 must only fall within a reasonable range of possible outcomes. *In re WCI Cable, Inc.*, 282
2 B.R. at 473-74.

3 102. Based on the foregoing, the First Lien Steering Committee believes that the
4 compromise embodied in the Plan and the Mediation Settlement is fair and equitable.
5 Specifically, the Mediation Settlement represents a global resolution of, among other things,
6 potential preference actions held by the Debtors' Estates relating to the transfer of funds to
7 certain Rhodes Entities within the one year period prior to the Petition Date, issues related to
8 the operation of the Reorganized Debtors' businesses and the ownership of the Rhodes
9 Ranch Golf Course.

10 103. The First Lien Steering Committee estimates that the total amount of all
11 payments made by the Debtors to the Rhodes Entities within the year prior to the Petition
12 Date is in excess of \$9 million. With respect to the first factor articulated by the *A&C*
13 *Properties* Court, litigation over the potential preference payments identified herein would
14 have been contentious and hard fought. The Rhodes Entities would likely have asserted a
15 number of defenses to the preference claims, including that such payments were received in
16 the ordinary course of business. Moreover, based on the First Lien Steering Committee's
17 review of all payments made to insiders within the one year period prior to the Petition Date
18 as reflected in the Debtors' Schedules and Schedule B to the Mediation Settlement Term
19 Sheet, and on subsequent conversations with Debtors' counsel, the First Lien Steering
20 Committee believes that the Rhodes Entities may have had valid defenses to certain of these
21 transfers. The Mediation Settlement also reflects a resolution of potential fraudulent
22 conveyance actions held by the Estates against the Rhodes Entities. The First Lien Steering
23 Committee believes that these claims would also have been heavily litigated in the absence
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of a settlement and, while the First Lien Steering Committee believes that it would have ultimately prevailed on certain of such claims, there can be no guarantee that a successful result would have been obtained for the Estates. In addition, the prosecution of both the fraudulent conveyance claims and the preference claims would have resulted in substantial expense for the Estates, while at the same time likely delaying the Debtors' emergence from chapter 11. Therefore, the First Lien Steering Committee believes that the third factor of the *A&C Properties* test also weighs in favor of the approval of the Mediation Settlement.³

104. The fourth factor of the *A&C Properties* test requires the Court to consider the paramount interest of creditors. The creditors of the Estates will derive a material benefit from the approval of the Mediation Settlement because, among other things, the Mediation Settlement (i) contemplates a \$3.5 million Cash payment from the Rhodes Entities to the Reorganized Debtors, which payment will be used to fund working capital needs and distributions contemplated by the Plan, (ii) provides for the transfer of the Arizona Assets, which were non-core assets to the Reorganized Debtors that likely would have required significant additional funding for development, to the Rhodes Entities, (iii) provides for the transfer of the Rhodes Ranch Golf Course, the maintenance and continued operation of which is paramount to maximizing the value of the Reorganized Debtors' assets, to the Reorganized Debtors, (iv) avoids the significant expense and time

³ The second factor to be considered by the Court in evaluating a settlement proposal is the difficulties, if any, to be encountered in the matter of collection. The First Lien Steering Committee has not completed a detailed review of the financial information of each Rhodes Entity that may have been liable in connection with the claims released under the Plan, and cannot therefore make a determination as to whether each such entity could have satisfied its obligations in connection with any judgment entered by the Court. The First Lien Steering Committee does, however, believe that the Rhodes Entities may not have been able to comply financially with the terms of judgments received in connection with successful litigation regarding the claims being released under the Plan.

1 delay associated with litigating the claims released under the Plan, which would have
2 yielded uncertain results, and (v) enables the Debtors to emerge from bankruptcy
3 expeditiously and consensually, without any unnecessary eradication of value through a
4 prolonged stay in chapter 11. In addition, all claims and causes of action against the Rhodes
5 Entities that are not covered by the limited release provided for in the Mediation Settlement
6 will be transferred to the Litigation Trust for the benefit of all creditors, to be prosecuted
7 and/or settled post-emergence, as appropriate.

8
9 105. In addition to the material benefits listed above, the First Lien Steering
10 Committee believes that the Mediation Settlement will also ensure a smooth transition to
11 new ownership under the Plan. The Mediation Settlement contemplates that stringent bond
12 and licensing requirements will be maintained through the cooperation of the Rhodes
13 Entities, thus allowing the Reorganized Debtors to continue operations without interruption
14 upon emergence. The Mediation Settlement also contemplates that new Qualified
15 Employees and HOA board representatives will be elected by the Reorganized Debtors to
16 ensure a unified and organized post-Effective Date management team. On balance, the First
17 Lien Steering Committee believes that the Estates and their creditors will be obtaining value
18 far in excess of the consideration to be given to the Rhodes Entities if the Mediation
19 Settlement is approved. Given the range of issues involved, and the nature and character of
20 the disputes between the First Lien Steering Committee, the Debtors and the Rhodes
21 Entities, the First Lien Steering Committee believes that approval of the Mediation
22 Settlement is appropriate. In addition, as set forth above, the Mediation Statement satisfies
23 the fair and reasonable standards articulated by courts in this circuit.
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1 **H. The Substantive Consolidation of the Debtors' Estates is Appropriate**

2 106. As previously noted, Article IV.A of the Plan provides for the substantive
 3 consolidation of all of the Estates into a single Estate for all purposes associated with
 4 confirmation and distributions to be made under the Plan. The substantive consolidation of
 5 all of the Debtors' Estates into a single consolidated Estate for purposes of confirmation and
 6 distributions to be made under the Plan is appropriate under the circumstances of the
 7 Chapter 11 Cases, and will result in significant benefits for the Debtors' creditors. In
 8 determining whether substantive consolidation is appropriate, courts consider (i) "whether
 9 creditors dealt with entities as a single economic unit and did not rely on their separate
 10 identity in extending credit," or (ii) "whether the affairs of the debtor are so entangled that
 11 consolidation will benefit all creditors." *Alexander v. Compton (In re Bonham)*, 229 F.3d
 12 750, 766 (9th Cir. 2000); *In re Cent. European Indus. Dev. Co. LLC*, 288 B.R. 572, 575-76
 13 (Bankr. N.D. Cal. 2003); *In re Standard Brands Paint Co.*, 154 B.R. 563, 572 (Bankr. C.D.
 14 Cal. 1993). Substantive consolidation may be ordered when the facts of a case demonstrate
 15 that either of these two factors is present. *In re Bonham*, 229 F.3d at 766.

16 107. Courts also generally consider a number of other factors in determining
 17 whether substantive consolidation is appropriate:

- 18 (a) the presence or absence of consolidated financial statements;
- 19 (b) the unity of interest and ownership among the various corporate entities;
- 20 (c) the degree of difficulty segregating and ascertaining individual assets and
 liabilities;
- 21 (d) the transfer of assets among corporate entities without formal observance of
 corporate formalities;
- 22 (e) the existence of parent and inter-corporate guarantees on loans;
- 23 (f) the commingling of assets and business functions;

- (g) the profitability of consolidation at a single physical location; and
- (h) the disregard of legal formalities.

See, e.g., Standard Brands Paint Co., 154 B.R. at 568-70; *Union Savs. Bank v. Augie/Restivo Banking Co., Ltd.* (*In re Augie/Restivo Baking Co., Ltd.*), 860 F.2d 515, 518 (2d Cir. 1988); *In re Food Fair, Inc.*, 10 B.R. 123, 126 (Bankr. S.D.N.Y. 1981).

108. Based on the facts and circumstances of the Debtors' Chapter 11 Cases, the First Lien Steering Committee believes that the substantive consolidation of the Debtors' Estates is warranted in light of the fact that the Debtors (i) operate as a single business enterprise under a single name; (ii) operate on a centralized basis with a centralized cash management system; (iii) share common parent companies; (iv) rely on a single corporate office for operational and other support services; (v) regularly conduct business with each other such that the flow of funds and transactions would be difficult to entangle; and (vi) are all obligated on the First Lien Lender Claims and the Second Lien Lender Claims. In addition, substantial Intercompany Claims existed between the various Debtors as of the Petition Date, and numerous Proofs of Claim were filed against the incorrect Debtor entity.

109. The First Lien Steering Committee believes that by substantively consolidating and pooling the Debtors' assets and liabilities for purposes of confirmation and distributions under the Plan, the Plan provides significant advantages that benefit all of the Debtors' creditors. First, over \$12 billion in duplicate secured debt Claims will be eliminated because the First Lien Lender Claims and the Second Lien Lender Claims each will be allowed only once against the consolidated Estate. Second, over \$500 million in Intercompany Claims will be deemed eliminated because the multiple Debtors will be deemed only one Debtor. Third, over \$4.6 million of other duplicate Unsecured Claims that have been filed in multiple Chapter 11 Cases will be automatically eliminated. Fourth,

1 approximately 35% of the Claims that have been filed are asserted against the wrong Debtor,
 2 and substantive consolidation will eliminate the need for the objection to such Claims.
 3

4 Accordingly, the First Lien Steering Committee submits that substantive consolidation of
 5 the Debtors' Estates is warranted in these cases.

RESPONSE TO OBJECTIONS

7 110. One conditional objection and one limited response were filed in connection
 8 with confirmation of the Plan: (i) the Conditional Objection to Chapter 11 Plan filed by
 9 Caterpillar Financial Services Corporation ("Caterpillar") on January 4, 2010 (Docket No.
 10 895) (the "Caterpillar Objection"); and (ii) the Limited Response to Second Amended
 11 Modified Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code for The
 12 Rhodes Companies, LLC, *et al.* filed by Credit Suisse AG, Cayman Islands Branch ("CS")
 13 on January 5, 2010 (Docket No. 899) (the "CS Response").

A. The Caterpillar Objection

111. The Caterpillar Objection asserts that, prior to the Petition Date, the Debtors
 were party to a finance lease agreement (the "Caterpillar Lease") with Caterpillar pursuant
 to which the Debtors leased certain equipment from Caterpillar (the "Equipment"). The
 Caterpillar Lease was not listed on Exhibit N to the Disclosure Statement as a contract to be
 assumed by the Debtors upon the Effective Date of the Plan. Accordingly, the Caterpillar
 Lease will be rejected as of the Effective Date. Caterpillar thus seeks assurance that upon
 the effectiveness of the rejection of the Caterpillar Lease, the Equipment will be returned to
 Caterpillar. The First Lien Steering Committee, as the proponent of the Plan, submits that
 upon the Effective Date of the Plan, either (i) arrangements will be made for Caterpillar to
 reclaim its Equipment or (ii) an alternative arrangement shall be made that is acceptable to

1 Caterpillar and the First Lien Steering Committee with respect to such Equipment.

2 Accordingly, the First Lien Steering Committee submits that the Caterpillar Objection
3 should be deemed resolved or otherwise overruled.

4

B. The CS Response⁴

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6 112. Pursuant to the CS Response, CS asserts that it supports confirmation of the
7 Plan but, nevertheless, has filed the CS Response because the Plan is silent as to how
8 distributions for unliquidated claims of First Lien Lenders are to be reserved. Specifically,
9 CS requests that the Court reserve, and prohibit the distribution of, an undisclosed amount of
10 Newco Equity Interests and New First Lien Notes to satisfy certain undisclosed,
11 unliquidated claims that CS may assert in the future for indemnification under the First Lien
12 Credit Agreement (the “CS Indemnification Claims”).

13

14 113. The basis for the CS Indemnification Claims is section 9.2(B) of the First
15 Lien Credit Agreement. As noted in the CS Response, Section 9.2(B) of the First Lien
16 Credit Agreement provides that the Debtors are required, under certain circumstances, to
17 indemnify CS for certain costs, losses, claims, damages, liabilities and expenses incurred in
18 connection with, among other things, claims or litigation related to the first lien debt. First
19 Lien Credit Agreement at 9.2(B) (A copy of Section 9.2(B) of the First Lien Credit
20 Agreement is attached hereto as Exhibit A). As of the date hereof, however, no claims have
21 been asserted against CS that would give rise to any CS Indemnification Claims and, thus,
22 the CS Indemnification Claims are contingent, unliquidated claims. Applicable law requires
23 that CS’s request for the establishment of a reserve be denied.
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28 ⁴Credit Suisse Loan Funding, LLC recused itself from issues regarding the First Lien Steering
Committee’s reply to the CS Response.

1 114. As the Court is aware, upon confirmation of a plan, the Bankruptcy Code
 2 “discharges the debtor from any debt that arose before the date of such confirmation.” 11
 3 U.S.C. § 1141(d)(1)(A). Bankruptcy Code section 101(12) provides that a “debt” is a
 4 “liability on a claim.” 11 U.S.C. § 101(12); *Pennsylvania Dep’t of Public Welfare v.*
 5 *Davenport*, 495 U.S. 552, 552 (1990). Confirmation, therefore, will discharge all claims
 6 whether such claim was allowed, liquidated, or a proof of claim was filed. *See* 11 U.S.C.
 7 § 1141(d)(1); *In re Dale’s Service, Inc.*, 2008 WL 2225643, at *3 (Bankr. D. Idaho 2008).
 8 Claims for indemnification are included within the claims discharged under a plan by
 9 application of Bankruptcy Code section 1141. *See In re All Seasons Resorts, Inc.*, 79 B.R.
 10 901, 904 (Bankr.C.D.Cal. 1987) (noting indemnification claims will be treated like any
 11 prepetition, unsecured claim); *In re Abercrombie*, 139 F.3d 755, 757 (9th Cir. 1998)
 12 (treating claims arising from prepetition contracts as non-prioritized, unsecured claims); *see also* *In re Hemingway Transport, Inc.*, 954 F.2d 1 (1st Cir. 1992). Accordingly, upon
 13 confirmation of the Plan, the Debtors will not have any continuing liability to CS or any
 14 other party for any Claims that may be asserted against CS under the First Lien Credit
 15 Agreement.

16 115. In addition, Bankruptcy Code section 502(e)(1)(B) mandates denial of the
 17 establishment of a reserve for potential CS Indemnification Claims. Bankruptcy Code
 18 section 502(e)(1)(B) provides, in pertinent part, that “the court shall disallow any claim for
 19 reimbursement or contribution of an entity that is liable with the debtor on or has secured the
 20 claim of a creditor, to the extent that...such claim for reimbursement or contribution is
 21 contingent as of the time of allowance or disallowance of such claim for reimbursement or
 22 contribution.” 11 U.S.C. § 502(e)(1)(B). The three requirements that must be met to
 23

1 disallow claims under section 502(e)(1)(B) are: (i) the claim must be for reimbursement or
 2 contribution; (ii) the party asserting the claim must be liable with the debtor on the claim;
 3 and (iii) the claim must be contingent at the time of its allowance or disallowance. *In re*
 4 *Dant & Russell, Inc.*, 951 F.2d 246, 248 (9th Cir. 1991). In this case, all three of the
 5 foregoing requirements to disallow the CS Indemnification Claims are satisfied.
 6

7 116. First, courts in the Ninth Circuit have repeatedly found indemnity claims to
 8 fall within the scope of reimbursement. *See generally In re All Seasons Resorts, Inc.*, 79
 9 B.R. at 904 (“They, in turn can seek indemnification from debtor, but their claim will be
 10 treated like any pre-petition, unsecured claim. In all likelihood, they will not get paid in full.
 11 *See* § 502(e).”). Second, courts have broadly interpreted the phrase “liable with” to include
 12 indemnity agreements. *In re Hill*, 268 B.R. 548, 553 (9th Cir. BAP 2001); *see also In re*
 13 *Krueger*, 127 B.R. 252, 254 (Bankr. D. Idaho 1991) (noting that indemnity claims are
 14 subject to section 502(e)(1)(B) and will “thus be denied”). The Ninth Circuit has also noted
 15 that “liable with” essentially requires “some version of shared liability.” *In re Hill*, 268 B.R.
 16 at 554. Third, Ninth Circuit law holds indemnification agreements to be contingent. *In re*
 17 *THC Financial Corp.*, 686 F.2d 799, 802 (9th Cir. 1982) (“The bankruptcy court determined
 18 that even though the indemnification claim did not mature until after the bankruptcy petition
 19 was filed in late 1976, the claim had existed as a contingent claim since the attornment and
 20 indemnification agreements were entered into early in 1976.”); *In re Hexcel Corp.*, 174 B.R.
 21 807, 810 (Bankr.N.D.Cal. 1994) (noting claims that might mature in the future “are by
 22 definition contingent”). Here, no claims have been asserted against CS and no litigation has
 23 been commenced against CS that would give rise to indemnification claims against the
 24 Debtors; thus, the CS Indemnification Claims are contingent. Accordingly, legal precedent
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1 applying Bankruptcy Code sections 1141(d)(1) and 502(e)(1)(B) make clear that CS's
2 claims for indemnification cannot survive confirmation of the Plan. Thus, CS's request for
3 the establishment of a reserve to satisfy these non-existent claims must be denied.
4

5 117. Notwithstanding the foregoing, CS may be able to seek reimbursement for
6 CS Indemnification Claims from certain of the First Lien Lenders. Section 9.2(c) of the
7 First Lien Credit Agreement provides that, subject to the satisfaction of certain conditions, to
8 the extent that the Debtors do not satisfy their obligations under 9.2(b) of the First Lien
9 Credit Agreement, each of the First Lien Lenders has the obligation to reimburse CS for
10 such lender's pro rata share of the Debtors' liability. *See* First Lien Credit Agreement at
11 Section 9.2(C) (A copy of section 9.2(C) of the First Lien Credit Agreement is attached
12 hereto as Exhibit A). The Plan and proposed Confirmation Order expressly provide that,
13 except as otherwise provided by the Plan, the First Lien Credit Agreement will continue in
14 effect for purposes of governing the rights and obligations of non-debtor parties to such
15 agreements vis-à-vis each other. *See* Plan Art. IV.E; Proposed Confirmation Order at ¶50.
16 The Plan and proposed Confirmation Order, however, provide that the foregoing reservation
17 will not affect the discharge of Claims or Interests pursuant to the Bankruptcy Code, the
18 Confirmation Order, or the Plan, or result in any expense or liability to the Reorganized
19 Debtors. *See* Plan Art IV.E; Proposed Confirmation Order at ¶50. Accordingly, subject to
20 any other provision of the Plan that may limit CS's rights under Section 9.2(C) of the First
21 Lien Credit Agreement, CS will retain its rights against the First Lien Lenders for
22 reimbursement of CS Indemnification Claims that are liquidated and compensable pursuant
23 to the terms of the First Lien Credit Agreement.
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1 118. For all of the foregoing reasons, the First Lien Steering Committee submits
2 that CS's request that a reserve be established to satisfy the contingent, unliquidated CS
3 Indemnification Claims must be denied.
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CONCLUSION

WHEREFORE, for the reasons set forth above, the First Lien Steering Committee respectfully requests the Court (i) confirm the Plan and (ii) grant the First Lien Steering Committee such other and further relief as is just and proper under the circumstances.

Dated this 11 day of January, 2010.

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Exhibit A

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CREDIT AGREEMENT

DATED AS OF NOVEMBER 21, 2005

among

**HERITAGE LAND COMPANY, LLC,
THE RHODES COMPANIES, LLC
and
RHODES RANCH GENERAL PARTNERSHIP,
as the Borrowers,**

**THE LENDERS LISTED HEREIN,
as the Lenders,**

and

**CREDIT SUISSE, CAYMAN ISLANDS BRANCH,
as Administrative Agent, Collateral Agent, Syndication Agent,
Sole Bookrunner and Sole Lead Arranger**

**\$430,000,000 SENIOR SECURED CREDIT FACILITY
(FIRST LIEN)**

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EXHIBITS

- Exhibit IForm of Administrative Questionnaire
- Exhibit II.....Form of Assignment Agreement
- Exhibit III.....Form of Assignment of Declarant's Rights
- Exhibit IVForm of Compliance Certificate
- Exhibit V.....Form of Disbursement Authorization
- Exhibit VIFinancial Plan
- Exhibit VIIForm of Intercreditor Agreement
- Exhibit VIII.....Form of Note
- Exhibit IXForm of Notice of Conversion/Continuation
- Exhibit X.....Form of Pledge and Security Agreement
- Exhibit XIDescription of Projects
- Exhibit XIIForm of Subsidiary Guaranty
- Exhibit XIII.....Form of Copyright Security Agreement
- Exhibit XIV.....Form of Solvency Certificate

assignment to secure obligations to a Federal Reserve Bank; provided that no such pledge or assignment shall release such Lender from any of its obligations hereunder or substitute any such pledgee or assignee for such Lender as a party hereto. Notwithstanding anything to the contrary contained herein, any Lender that is a Fund may, without the consent of the Borrowers or the Administrative Agent, create a security interest in all or any portion of the Loans owing to it and the Notes, if any, held by it to the trustee for holders of obligations owed, or Securities issued, by such Fund as security for such obligations or Securities; provided that unless and until such trustee actually becomes a Lender in compliance with the other provisions of this subsection 9.1, (i) no such pledge shall release the pledging Lender from any of its obligations under this Agreement and (ii) such trustee shall not be entitled to exercise any of the rights of a Lender under this Agreement and the Notes even though such trustee may have acquired ownership rights with respect to the pledged interest through foreclosure or otherwise.

G. SPV Lender. Notwithstanding anything to the contrary contained herein, any Lender (a “Granting Lender”) may grant to a special purpose funding vehicle (a “SPV”), identified as such in writing from time to time by the Granting Lender to the Administrative Agent and the Borrowers, the option to provide to the Borrowers all or any part of any Loan that such Granting Lender would otherwise be obligated to make the Borrowers pursuant to this Agreement; provided that (i) nothing herein shall constitute a commitment by any SPV to make any Loan, (ii) if an SPV elects not to exercise such option or otherwise fails to provide all or any part of such Loan, the Granting Lender shall be obligated to make such Loan pursuant to the terms hereof. The making of a Loan by an SPV hereunder shall utilize the Commitment of the Granting Lender to the same extent, and as if, such Loan were made by such Granting Lender. Each party hereto hereby agrees that no SPV shall be liable for any indemnity or similar payment obligation under this Agreement (all liability for which shall remain with the Granting Lender). An SPV shall not be entitled to receive any greater payment under subsection 2.7 that the Granting Lender would have been entitled to receive with respect to the Loan or portion of the Loan granted to such SPV, unless the grant to such SPV is made with the Borrowers’ prior written consent. In furtherance of the foregoing, each party hereto hereby agrees (which agreement shall survive the termination of this Agreement) that, prior to the date that is one year and one day after the payment in full of all outstanding commercial paper or other senior indebtedness of any SPV, it will not institute against, or join any other Person in instituting against, such SPV any bankruptcy, reorganization, arrangement, insolvency or liquidation proceedings under the laws of the United States or any State thereof. In addition, notwithstanding anything to the contrary contained in this subsection 9.1, any SPV may (i) with notice to, but without the prior written consent of, the Borrowers and the Administrative Agent and without paying any processing fee therefore, assign all or a portion of its interests in any Loans to the Granting Lender or to any financial institutions (consented to by the Borrowers and Administrative Agent) providing liquidity and/or credit support to or for the account of such SPV to support the funding or maintenance of Loans and (ii) disclose on a confidential basis any non-public information relating to its Loans to any rating agency, commercial paper dealer or provider of any surety, guarantee or credit or liquidity enhancement to such SPV. This subsection 9.1 may not be amended without the written consent of the SPV.

9.2 Expenses; Indemnity; Damage Waiver.

A. Costs and Expenses. Each of the Borrowers shall pay all actual and documented out-of-pocket expenses incurred by each Agent and its Affiliates, including the reasonable and documented fees, charges and disbursements of its appraiser, counsel (including, without limitation, special and local counsel) for each Agent and its Affiliates (and fees and time charges for attorneys who may be employees of such Agent or Affiliates) and filing and recording fees and expenses, in connection with the syndication of the credit facilities provided for herein, the development, preparation, negotiation, execution, delivery, closing, funding, and administration of this Agreement and the other Loan Documents, any Modifications or waivers of the provisions hereof or thereof (whether or not the

transactions contemplated hereby or thereby shall be consummated), or in connection with the enforcement or protection of its rights in connection with this Agreement and the other Loan Documents, including its rights under this subsection 9.2A, or in connection with the Loans made hereunder, including all such out-of-pocket expenses incurred during any workout, restructuring or negotiations in respect of such Loans.

B. Indemnification by the Borrowers. Each of the Borrowers shall indemnify each Agent (and any sub-Agent thereof), each Lender, their respective successors and assigns and each Related Party of any of the foregoing Persons (each such Person being called an "Indemnitee") against, and hold each Indemnitee harmless from, any and all costs, losses, claims, damages, liabilities and expenses (including, without limitation, the reasonable fees, charges and disbursements of any counsel and consultants for any Indemnitee (and fees and time charges for attorneys who may be employees of any Indemnitee)) of any kind or nature whatsoever, incurred by or asserted against any Indemnitee arising out of, in connection with, or as a result of (i) the execution, delivery, enforcement or administration of this Agreement, any other Loan Document or any agreement or instrument contemplated hereby or thereby, the performance by the parties hereto of their respective obligations hereunder or the consummation of the transactions contemplated hereby or thereby, (ii) any Loan or the use of the proceeds therefrom, (iii) any actual or alleged presence or Release of Hazardous Materials on or from any property, any Environmental Claim or any Environmental Liabilities related in any way to any Borrower or any of its Subsidiaries, (iv) any claim, demand or liability for any brokerage commissions, or broker's or finder's fees or investment banking or similar fees incurred or alleged to have been incurred in connection with any of the Transactions, and any claim, demand or liability relating thereto or (v) any actual or prospective claim, litigation, investigation or proceeding relating to any of the foregoing, whether based on contract, tort or any other theory and regardless of whether any Indemnitee is a party thereto (and regardless of whether such matter is initiated by a third party or by the Borrowers or any of their respective Affiliates); provided that such indemnity shall not, as to any Indemnitee, be available to the extent that such costs, losses, claims, damages, liabilities and expenses are determined by a court of competent jurisdiction by final and nonappealable judgment to have resulted primarily from the gross negligence or willful misconduct of such Indemnitee.

C. Reimbursement by the Lenders. To the extent that a Borrower fails to pay any amount required under subsection 9.2A or 9.2B to be paid by it to any Agent (or any sub-Agent thereof) or any Related Party of any of the foregoing, each Lender severally agrees to pay to the Agent (or any such sub-Agent) or such Related Party, as the case may be, such Lender's Pro Rata Share (determined as of the time that the applicable unreimbursed expense or indemnity payment is sought) of such unpaid amount, provided that the unreimbursed expense or indemnified loss, claim, damage, liability or related expense, as the case may be, was incurred by or asserted against such Agent (or any such sub-Agent) in its capacity as such, or against any Related Party of any of the foregoing acting for such Agent (or any such sub-Agent) in connection with such capacity. The obligations of the Lenders under this subsection 9.2C are subject to the provisions of subsection 9.12.

D. Waiver of Consequential Damages, Etc. To the fullest extent permitted by Applicable Law, each of the Borrowers shall not assert, and hereby waives, any claim against any Indemnitee, on any theory of liability, for special, indirect, consequential or punitive damages (as opposed to direct or actual damages) arising out of, in connection with, or as a result of, this Agreement, any other Loan Document or any agreement or instrument contemplated hereby, the transactions contemplated hereby or thereby, any Loan or the use of the proceeds thereof. No Indemnitee referred to in subsection 9.2B above shall be liable for any damages arising from the use by unintended recipients of any information or other materials distributed by it through telecommunications, electronic or other information transmission systems in connection with this Agreement or the other Loan Documents or the transactions contemplated hereby or

thereby, unless such damages are directly caused solely by the gross negligence or willful misconduct of such Indemnitee as determined by a court of competent jurisdiction by final and nonappealable judgment.

E. Payments. All amounts due under this subsection 9.2 shall be payable promptly after demand therefor.

9.3 Right of Set-Off.

Without limitation of any other rights of the Agents or Lenders, and subject to the terms of the Intercreditor Agreement, if an Event of Default shall have occurred and be continuing, each Agent, Lender and each of their respective Affiliates is hereby authorized at any time and from time to time, to the fullest extent permitted by Applicable Law, to set off and apply any and all deposits (general or special, time or demand, provisional or final, in whatever currency) at any time held and other obligations (in whatever currency) at any time owing by such Agent, Lender, or any such Affiliate to or for the credit or the account of a Borrower against any and all of the Obligations of the Borrowers now or hereafter existing under this Agreement or any other Loan Document to such Agent or Lender, irrespective of whether or not such Lender shall have made any demand under this Agreement or any other Loan Document and although such Obligations of the Borrowers may be contingent or unmatured or are owed to a branch or office of such Lender different from the branch or office holding such deposit or obligated on such indebtedness. The rights of each Agent, Lender and their respective Affiliates under this subsection 9.3 are in addition to other rights and remedies (including other rights of setoff) which such Agent, Lender or their respective Affiliates may have and are subject to the terms of the Intercreditor Agreement. Each Agent and Lender agrees promptly to notify the Borrowers and the Administrative Agent after any such setoff and application; provided that the failure to give such notice shall not affect the validity of such setoff and application.

9.4 Sharing of Payments by Lenders.

If any Lender shall, by exercising any right of setoff or counterclaim or otherwise, obtain payment in respect of any principal of or interest on any of its Loans or other obligations hereunder resulting in such Lender's receiving payment of a proportion of the aggregate amount of its Loans and accrued interest thereon or other such obligations greater than its Pro Rata Share thereof as provided herein, then the Lender receiving such greater proportion shall (a) notify the Administrative Agent of such fact and (b) purchase (for Cash at face value) participations in the Loans and such other obligations of the other Lenders, or make such other adjustments as shall be equitable, to the end that the benefit of all such payments shall be shared by the Lenders ratably in accordance with the aggregate amount of principal of and accrued interest on their respective Loans and other amounts owing them; provided that (i) if any such participations are purchased and all or any portion of the payment giving rise thereto is recovered, such participations shall be rescinded and the purchase price restored to the extent of such recovery, without interest and (ii) the provisions of this paragraph shall not be construed to apply to (x) any payment made by the Borrowers pursuant to and in accordance with the express terms of this Agreement or (y) any payment obtained by a Lender as consideration for the assignment of or sale of a participation in any of its Loans to any assignee or participant, other than to a Borrower or any Subsidiary thereof (as to which the provisions of this paragraph shall apply). Each of the Borrowers consents to the foregoing and agrees, to the extent it may effectively do so under applicable law, that any Lender acquiring a participation pursuant to the foregoing arrangements may exercise against any Borrower rights of setoff and counterclaim with respect to such participation as fully as if such Lender were a direct creditor of such Borrower in the amount of such participation.